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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

FOR THE
WESTERN DIVISION.
APRIL TERM, 1907
AND
SPECIAL SEPTEMBER TERM, 1907.

EASTERN DIVISION
SEPTEMBER TERM, 1907.

CHARLES T. CATES, JR.
ATTORNEY-GENERAL AND REPORTER.

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ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1907.

(Continued from 118 Tenn.)

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* C. A. LEAZER, Administratrix.

(Jackson. April Term, 1907.)

1. VERDICT. Conclusive on facts upon appeal.

The verdict of the jury is conclusive, upon appeal, as to all controverted questions of fact. (*Post*, p. 5.)

2. PERSONAL INJURIES OR WRONGFUL DEATH. Action did not pass or survive to any except as provided in statute previous to Acts 1903, ch. 317.

Previous to the enactment of the statute (Acts 1903, ch. 317) to prevent the abatement of suits for personal injuries or death from a wrongful act because of the death of the

Railroad v. Leazer.

beneficiary, it was the rule, under the then existing statutes, that the right of such action did not pass to any person or survive to any beneficiary, excepting those appointed in the statute as entitled to the recovery when the cause of action accrued. (*Post*, pp. 5-11.)

Code cited and construed: Sec. 4025 (S.); sec. 3130 (M. & V.); sec. 2291 (T. & S. and 1858).

Case cited and approved: Railroad v. Bean, 94 Tenn., 388, 396.

3. **SAME.** Same. Statute to prevent abatement of suit does not apply in suit previously adjudged to be abated, when.

The statute (Acts 1903, ch. 317) to prevent the abatement of suits for personal injuries or death from a wrongful act, because of the death of the beneficiary, is not applicable, where, under the previous rule stated in the foregoing headnote, it was adjudged, upon plea in abatement, in the mother's pending suit, before the enactment of such statute, that the right of action or suit had abated on account of the death of the father of the deceased boy, and could not be prosecuted for the benefit of the mother. (*Post*, pp. 5-12.)

Acts cited and construed: Acts 1903, ch. 317.

4. **SAME.** Same. Same. Party not appealing not entitled to review of action sustaining plea in abatement, when.

The ruling of the court below sustaining the defendant's plea in abatement as shown in the foregoing headnote cannot be reviewed upon the appeal of the defendant alone. (*Post*, p. 12.)

5. **SAME.** In action for the damages for the wrongful death, an amendment to recover for loss of services during minority of deceased is not permissible.

The mother's suit as administratrix of her deceased minor son to recover damages for his wrongful death is a suit in the right of the deceased himself, and to recover damages suffered, first, by himself, and, second, the damages resulting to his next of kin, which are adjudged to be the pecuniary

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value of his life; and in such suit, an amendment seeking to recover damages for the loss of the services of the deceased during his minority was wholly unauthorized. (*Post*, pp. 12-16.)

Code cited and construed: Secs. 4025-4028, 4503, 4504 (S.); secs. 3130-3134, 3503, 3504 (M. & V.); secs. 2291-2293, 2803, 2804 (T. & S. and 1858).

Cases cited and approved: *Whaley v. Catlett*, 103 Tenn., 347; *Love v. Railroad*, 108 Tenn., 125; *Davidson-Benedict Co. v. Severson*, 109 Tenn., 967.

6. SAME. Mother's right of action for loss of services is limited to injuries not resulting in death of minor child, when.

Upon a proper construction of the statute (Shannon's Code, sec. 4503), giving a right of action to the mother, upon the father's death, for expenses and actual loss of service resulting from an injury to her minor child, the mother's right of action is limited to injuries not resulting in death. (*Post*, pp. 9, 10, 15, 16.)

Code cited and construed: Secs. 4503-4505 (S.); secs. 3503-3505 (M. & V.); secs. 2803-2805 (T. & S. and 1858).

Cases cited and approved: *Cargle v. Railroad*, 7 Lea, 719; *Railroad v. Doak*, 115 Tenn., 720.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County.—J. P. YOUNG, Judge.

MCFARLAND & CANADA, for Railroad.

BELL, TERRY, ANDERSON & BELL, for Leazer.

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MR. JUSTICE MCALISTER delivered the opinion of the Court.

Plaintiff below recovered a verdict and judgment against the railroad company for the sum of \$2,500 as damages for the negligent killing of her son. The company appealed, and has assigned errors. The record reveals that Oliver Leazer, a boy about ten years of age, was killed November 23, 1900, on Kentucky avenue, in the city of Memphis, by a backing freight train belonging to defendant company. The boy had been sent from his mother's home, at the corner of Kentucky and Iowa avenues, to a vacant lot south of Iowa avenue, for the purpose of driving home the cow. The night was dark, and it was drizzling rain. There is evidence tending to show that there was no light or lookout on the first car of the train, which contained sixteen or seventeen cars. The train was going from the north yard to the south yard, and was being pushed by a backing engine. At the time of the accident it was running at the rate of fifteen to twenty miles an hour. It was not claimed that any of the statutory precautions were observed; but the contention on the part of the company is that the accident occurred in the switch yards of the company, where the statute did not apply. There was only one eyewitness to the accident, who saw an object on the track in the form of a boy, as if stooping to pick up something from the ground, when he was struck by the car and knocked from the track. The witness immediately went to the object, and discovered

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that it was Oliver Leazer, whom she had previously known. The theory advanced on behalf of the company is that the deceased sustained the injury resulting in his death while trying to board the car, and that the company was in no wise liable for his death. The verdict of the jury, however, has settled all controverted questions of fact arising on the record. It appears that on the 28th of November, 1900, his father, J. H. Leazer, took out letters of administration, intending to bring suit against the company for the death of his intestate, but prior to the institution of any suit the father died. Mrs. C. A. Leazer, mother of the boy, then qualified as administratrix and instituted the present action.

The declaration alleged that the plaintiff was the mother and next of kin of said Oliver, and by Code Tenn., section 2291 (section 4025, Shannon's Code), she is the beneficiary and entitled in this action to recover damages against the defendant for wrongfully and negligently killing said Oliver, and sues as the personal representative for the recovery of said damages which she, as next of kin at the time of his death, was then and there entitled to receive. It is alleged in the declaration that neither the fireman, the engineer, nor any one else was on the lookout; that no light was on the first freight car of the train, and no bell was rung, whistle sounded, or effort made to see the deceased or avoid the collision. The declaration expressly charges that the company failed to comply with the statutory regulations intended to prevent accidents on railroad

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tracks. The declaration further alleges that there was no flagman or guard at this crossing, in violation of the city ordinance requiring the same. The declaration also charges the train was running at a dangerous rate of speed exceeding six miles an hour, and in violation of a city ordinance.

The company interposed a plea in abatement to this declaration, averring that at the death of the son he left surviving him his father as his next of kin, who was entitled to the recovery, and further averring that letters of administration were issued on the 28th of November, 1900, to the father, but that, without bringing suit, the father had died prior to the institution of the present suit by the mother. Wherefore it was averred that the death of the father had abated the suit. The plea in abatement proceeded upon the idea that the father was the sole beneficiary of the right of action, and that under authority of *Railroad v. Bean*, 94 Tenn., 388, 29 S. W., 370, upon the death of the father the right of action abated, and no suit could thereafter be brought in the name of the mother or other beneficiary. A demurrer was interposed on behalf of the plaintiff, Mrs. C. A. Leazer, to the plea in abatement interposed by the company, averring that, since the father and mother belonged to the same class, the right of action had not abated, and therefore the plea was insufficient in law. The court overruled the demurrer, but granted the plaintiff leave to amend her declaration. An amended declaration was accordingly

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filed November 23, 1903, averring that at the time of the death of the son the plaintiff, Mrs. C. A. Leazer, had been abandoned or deserted by her husband, J. H. Leazer, and that she had been left to support herself and children. In this declaration the plaintiff sought to recover the pecuniary value of the life of her deceased son, and also the value of his services until he reached his majority; and also the expense incurred for medical and burial bills, which had been paid by the mother, Mrs. C. A. Leazer. To this declaration the defendant demurred, alleging the same grounds that were raised by the plea in abatement, and upon consideration of the demurrer it was sustained by the court, except as to the claims for medical bills and burial expenses and damages for loss of the services of the deceased until his majority. The result of the action of the court on the demurrer was to deny the plaintiff any right of recovery for the pecuniary value of the life of her deceased son, since the father was the sole beneficiary of that right of action, and, the father having died, it did not pass to the mother; but the court held that the mother would be entitled to recover for the loss of the services of her son until he reached his majority, and also for expenses incurred by her for medical treatment and burial of her deceased son. But, since the amended declaration claimed damages for loss of services of the minor in the name of the administratrix for use of the mother, permission was asked and leave obtained to file a second amended declaration, which

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was accordingly done October 25, 1904. In this second amended declaration Mrs. C. A. Leazer, mother of the deceased boy, claimed in her own right, and not as administratrix, damages for loss of services of the intestate son from the date of his death until the date of his majority. This was the only claim made in the second amended declaration. A demurrer was interposed on behalf of the company, which was overruled by the trial judge. After the demurrer was overruled the defendant filed two pleas: First, the general issue; second, a special plea denying that at the time of the death of the intestate the plaintiff was supporting herself and her children without the aid and assistance of intestate's father, and denying that for several years prior to the death of intestate's father he had abandoned plaintiff and left her to support herself and children; third, the statute of limitations of one year was pleaded. On the issues thus formulated the cause was heard by the court and jury July 2, 1906, resulting in a mistrial. The cause was again heard at the November term, 1906, resulting in a verdict and judgment in favor of the plaintiff for the sum of \$2,500 against the defendant company.

On the trial Mrs. Leazer testified that she and her husband had been living separate and apart, and that the entire support of herself and family devolved on her, for the reason that she had been abandoned by her husband. J. L. Long, another witness, testified that prior to the death of J. H. Leazer he had been living

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separate and apart from his wife, and had boarded for several months prior to the death of the child at the house of the witness. It is true that J. H. Leazer died at the home of his wife, the plaintiff; but she explains that when he came home he was in a dying condition, and begged the family to forgive him and permit him to die there, and requested that they do all they could for him. The wife testified that under the circumstances she could not refuse to let him come home. He died in several days after he came home.

The first assignment of error is that the court erred in not sustaining the demurrer filed on behalf of the company December 10, 1904, to the second amended declaration of the plaintiff filed October 25, 1904. In support of this assignment of error it is said by counsel for the company that the plaintiff, as administratrix of her deceased son, had first filed a declaration under section 4025, Shannon's Code, claiming the right of recovery as beneficiary of the right of action of her son, and not claiming under section 4503 of the Code for loss of services of her son. The two sections of the Code referred to may be here quoted.

Shannon's Code, section 4503:

"Father or Mother may Sue for Loss by Injury to Minor Child.—A father, or in case of his death or desertion of his family, the mother may maintain an action for the expense and actual loss of service resulting from an injury to a minor child in the parent's

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service or living in the family." (Code Ala. 1852, section 2135; Code Iowa 1860, section 2792.)

Shannon's Code, section 4505:

"Wife may Sue and be Sued When Husband Deserts.
—Where the husband has deserted his family the wife may prosecute or defend in his name any action which he may have prosecuted or defended; she may also sue or be sued in her own name for any cause of action accruing subsequently to the desertion." (Laws 1835-36, p. 166, c. 56.)

The section of Shannon's Code upon which the plaintiff brought her original suit is section 4025, as follows:

"The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow to his children, or to his personal representative for the benefit of his widow or next of kin free from the claims of creditors." (Laws 1851-52, p. 23, c. 17; Laws 1871, p. 70, c. 78, sec. 1.)

Now, as already stated, a plea in abatement was sustained to the original action by the plaintiff, as administratrix, upon the ground that her husband, J. H. Leazer, who was the sole beneficiary of the deceased intestate's son, had died, and that the right of action did not then pass to another beneficiary, but wholly

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abated. The trial judge sustained the plea in abatement under the authority of *Railroad v. Bean*, 94 Tenn., 388, 29 S. W., 370. In that case we held, in construing this statute:

“That the right of action does not pass to any person or survive to any beneficiary, excepting those appointed in the statute so entitled to the recovery when the cause of action accrued.”

It was accordingly held in that case that a suit for the wrongful killing of a decedent, brought by his administrator for the sole benefit of his widow, there being no surviving children, abates upon the death of the widow, occurring even after judgment below and pending appeal in this court. Such suit cannot be revived or prosecuted, after the widow's death, for the benefit of the father of the deceased, or of others standing next in the line of succession.

The rule, however, announced in *Railroad v. Bean*, supra, was changed by an act of the general assembly of the State of Tennessee, approved April 2, 1903, being chapter 317, p. 938, of the Acts of 1903, as follows:

“No suit now pending or hereafter brought for personal injuries or death from a wrongful act in any of the courts of this State, whether by appeal or otherwise, and whether in an inferior or superior court shall abate or be abated because or on account of the death of the beneficiary or beneficiaries for whose use and benefit said suit was brought, and such suit shall be proceeded with to a final judgment, as though such

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beneficiary or beneficiaries had not died, for the use and benefit of the heirs at law of such deceased beneficiary."

It is said, however, that the act of 1903 is inapplicable to the present suit, for the reason that the cause of action accrued November 23, 1900, when the boy was killed, and that the judgment of the court sustaining the plea in abatement and enforcing the rule announced in *Railroad v. Bean*, supra, was pronounced December 18, 1902, while the act of assembly changing the rule in *Railroad v. Bean* was not passed until April 2, 1903, and hence that act can have no application in this case.

We think this contention is sound, and the act of 1903 is inapplicable in the present case, for the reason that long before it was passed it had been adjudged herein that the suit had abated on account of the death of the father, and could not be revived and prosecuted for the benefit of the mother, of the boy. In other words, the court had applied the rule announced by this court in *Railroad v. Bean*, supra, and the ruling of the court on this subject cannot now be reviewed on the appeal of the defendant company.

The main question presented on this assignment of error is whether the circuit judge should have sustained the demurrer interposed on behalf of the company to the second amended declaration herein. The mother of the deceased boy sought to recover for the loss of his services from the time of his death until the time he would have attained his majority. It will be ob-

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served in the first place that this right of action is secured by section 4503 to the father, or, in case of his death or desertion of his family, to the mother, and the statute does not contemplate a suit for the recovery of such damages by the administratrix of the deceased. It will also be observed that the amended declaration, presenting the claim of the mother for the loss of the services of her deceased son, was filed in a suit which had been brought by her as administratrix under section 4025 of the Code. The right of action given by that section of the Code under all the authorities was the action of the deceased, which did not abate on account of his death, but passed to certain beneficiaries in the order named in the statute. Construing this section of the Code and other constituent statutes in *Whaley v. Catlett*, 103 Tenn., 347, 53 S. W., 133, it was said by this court that:

“These sections provide alone for the continued existence and passing of the right of action of the deceased, and not for any independent cause of action in the widow, children, or next of kin. Section 4025, Shannon’s Code, refers to it as the right of action which the deceased would have had in case death had not ensued, and provides that it shall not abate or be extinguished, but shall pass to his widow, etc. It does not provide for or refer to any new cause of action arising or coming into existence in their favor. It is alone by virtue of these statutes that a right of action exists in the widow, children, or next of kin at all for the unlawful kill-

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ing of the deceased, and this right exists under the statute, not because it arises directly to them in their own right, but because it passes to them in the right of the deceased."

In *Love v. Southern Railway Company*, 108 Tenn., 125, 65 S. W., 475, 55 L. R. A., 471, it was said:

"When therefore, the action is brought by the representative of the deceased, although it is for the benefit of the widow, children, or next of kin, it is not in his right, but is in the right of the deceased, and is but a continuation of that right or cause of action."

In *Davidson-Benedict Co. v. Severson*, 109 Tenn., 572, 72 S. W., 967, it was held that:

"Under these statutes (Shannon's Code, sections 4025, 4028) two classes of damages are recoverable: First, damages purely for the injury to the deceased himself, and in this class are embraced damages for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries; second, the incidental damages suffered by the widow, children, or next of kin from the death, and in this class is embraced the pecuniary value of the life of the deceased, to be determined:

"(a) Upon a consideration of his expectancy of life, his age, conditions of health, and strength.

"(b) Capacity for labor and for earning money through skill in any art, trade, profession, occupation, or business.

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“(c) And his personal habits, as to sobriety and industry.”

It was held that the cause of action accrued to the deceased, and that both classes of damages are recoverable in one and the same action.

In view of our statutes and decisions, it must be apparent that when Mrs. Leazer, as administratrix of her deceased son, brought the original action, it was in the right of the deceased himself, and to recover damages suffered, first, by himself, and, second, the damages resulting to his next of kin, which are adjudged to be the pecuniary value of his life. In such a suit an amendment seeking to recover damages for the loss of the services of a minor child was wholly unauthorized. Such a suit could only be brought by the father, or, in case of his death or desertion of his family, by the mother, under section 4503 of Shannon's Code. As already seen, the present action was brought by the mother, as administratrix, under sections 4025, 4028, of the Code, to recover, first, damages purely for the injury to the deceased himself, and, second, the pecuniary value of the life of the deceased for the benefit of his next of kin. It is obvious that an amendment to the declaration in this original suit, which introduced a claim on the part of the mother for loss of the services of her deceased son, introduced a new statutory cause of action, which was wholly outside of the object and purposes of the original suit.

Moreover, we are of opinion that upon a proper con-

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struction of section 4503 of the Code the right of action given to the mother is limited to injuries not resulting in death. Where death occurs by a wrongful act, the rights of the parents are to be redressed under sections 4025-4028 of Shannon's Code. This construction of the statute is obvious from a consideration of the next succeeding section (4504), which provides: "An action for the injury to the child shall be brought in the name of the child itself." *Cargle, by Next Friend v. N., C. & St. L. Ry.*, 7 Lea, 719.

Again, the recovery allowed by section 4503 is limited to the expenses and actual loss of services resulting from an injury to a minor child. *Railway v. Doak*, 115 Tenn., 720, 92 S. W., 853.

This construction of the statute will harmonize what otherwise might appear conflicting remedies and will afford the parent an ample remedy under sections 4025-4028 for injuries sustained in consequence of the unlawful killing of the child, and also a remedy under section 4503 for expenses and actual loss of services resulting from an injury to the child, not resulting in death. In this view of the statute we are of the opinion that the plaintiff is not entitled to maintain this recovery, based, as it is, entirely on section 4503 of Shannon's Code.

The circuit judge was therefore, in error in overruling the demurrer of the defendant company to this second amended declaration. The judgment below is therefore reversed, the demurrer sustained, and the plaintiff's suit dismissed.

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JOHN M. GRIER v. W. R. CANADA *et al.*

(Jackson. April Term, 1907.)

1. **WILLS.** Devise of land to be divided among devisee's bodily heirs at his death vests in him a life estate only, when.

A devise of real estate to testator's son, and at his death to be equally divided among his bodily heirs as the property of the testator, vests in the son only a life estate. (*Post*, pp. 22, 24.)

2. **SAME.** Certified copy of probated will is *prima facie* evidence of its validity; what may be shown; issue of *devisavit vel non* is not triable, when.

The heir, seeking to establish his title to land in a suit to recover it, may proceed upon a certified copy of the probated will, which, when duly attested, is *prima facie* evidence of the validity of the will, but it is not conclusive; and while the fact that fraud was committed in drawing or obtaining the will or that it was not formally executed and attested, may be shown, yet it is not admissible in such a suit to try an issue of *devisavit vel non*. (*Post*, pp. 28-31.)

Code cited and construed: Secs. 3929-3931 (S.); secs. 3037-3039 (M. & V.); secs. 2197-2199 (T. & S. and 1858).

Acts cited and construed: Acts 1784 (Oct. Ses.), ch. 10, sec. 6.

Cases cited and approved: *Weatherhead v. Sewell*, 9 Humph., 272; *Brown v. Brown*, 14 Lea, 253.

3. **SAME.** Probate record of holographic will must show what, to be valid as to land; good as to personalty, when.

The probate record of a holographic will must show, among other things, that the handwriting of the testator was generally known by his acquaintances and that three credible witnesses proved that the writing and every part of it was in his hand, to be valid and effective as to the land devised. Probate record of proof by two witnesses that they were well ac-
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quainted with the testator's handwriting, and that the signature to the will is in his handwriting, is fatally defective and insufficient to sustain a holographic will of realty, because the statutory requirements do not appear in the record, but it would be good for a will of personalty. (*Post*, pp. 31. 32.)

Code cited and construed: Sec. 3896 (S.); sec. 3004 (M. & V.); sec. 2163 (T. & S. and 1858).

4. SAME. Re-probate supplying defects nineteen years after original probate is *prima facie* sufficient, when.

Where the probate record of a holographic will made in 1886 was insufficient as to realty, but sufficient as to personalty, a re-probate thereof made in 1905, upon motion in an *ex parte* proceeding without petition or notice, as required for probate in solemn form, but with all the formalities required to probate a holographic will as to land, is sufficient to make out a *prima facie* case in favor of a beneficiary under the will, since it was an ancillary proceeding to supply formalities that were omitted in a former order rather than to destroy the original probate, and the burden of proving the invalidity of the will for fraud, accident, or mistake, devolved upon those asserting it. The right to re-probate was not barred by the lapse of time. (*Post*, pp. 32-34.)

5. ESTOPPEL. By statements and admissions in sworn pleadings in other suits.

A party will not be permitted to deny in one proceeding facts which he has admitted or averred in his solemn pleadings under oath in another proceeding. Hence, where defendants had asserted in sworn pleadings in other suits or proceedings that a certain decedent had left a last will and testament, which was duly probated, etc., they are estopped to deny the probate of the will. (*Post*, pp. 34-37.)

Cases cited and approved: *Hamilton v. Zimmerman*, 5 Sneed, 39; *Stephenson v. Walker*, 8 Bax., 289; *Chilton v. Scruggs*, 5 Lea, 318.

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6. SAME. By deposition in judicial proceedings.

Where a party has testified to certain facts in a deposition taken in judicial proceedings, he will be estopped from denying such facts in another proceeding. (*Post*, p. 36.)

Cases cited and approved: *Cooley v. Steele*, 2 Head, 605; *Stillman v. Stillman*, 7 Bax., 175.

7. INNOCENT PURCHASER. Defense must be made by answer or special plea.

The defense of innocent purchaser must be made either by the answer or special plea. (*Post*, p. 37.)

Case cited and approved: *Dunham v. Harvey*, 111 Tenn., 620.

8. SAME. Refusal to permit plea to be filed at hearing will not be reviewed on appeal.

The action of the chancellor in declining to permit the plea of innocent purchaser to be filed after all the evidence had been taken and the case was about to be tried will not be reviewed on appeal. It was a matter in the sound discretion of the chancellor. (*Post*, p. 37.)

9. HOMESTEAD. Abandoned by removal from the State by a wife cohabiting with another man.

Since Acts 1879, ch. 171, the right of homestead is not dependent upon occupancy, and an assigned homestead is not abandoned by removal from the premises, except by permanent removal beyond the limits of the State. Our homestead and exemption laws are for citizens only, and not for nonresidents, and the homestead is abandoned or forfeited when the occupant becomes nonresident. Hence, where one claiming a right under assigned homestead deserted her husband and removed to another State, where she cohabited for several years with another man, the homestead was abandoned when she became a nonresident. (*Post*, pp. 37-42.)

Code cited and construed: Sec. 4227 (S.); sec. 3331 (M. & V.); sec. 2474 (T. & S. and 1858).

Acts cited and construed: Acts 1879, ch. 171.

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Cases cited and approved: *Prater v. Prater*, 87 Tenn., 78; *Carrigan v. Rowell*, 96 Tenn., 185; *Farris v. Sipes*, 99 Tenn., 300; *Briscoe v. Vaughn*, 103 Tenn., 311; *Colle v. Hudgins*, 109 Tenn., 220; *Freeman v. Freeman*, 111 Tenn. 151.

10. SAME. When assigned, is transferable as life estate.

Homestead, when assigned, is transferable as a life estate. (*Post*, p. 40.)

Cases cited and approved: *Cowan v. Carson*, 101 Tenn., 523; *Delk v. Yelton*, 103 Tenn., 480; *McCrae v. McCrae*, 103 Tenn., 721.

11. PRESUMPTION. Of continuance of life, when.

Where a person is shown to be living at a certain time, the presumption of continued life arises, in the absence of proof, as where a husband is shown to be living when he procures a divorce from his wife, he will be presumed, in the absence of proof, to be living, when she subsequently marries her co-adulterer, and attempts to convey the homestead. (*Post*, p. 41.)

12. HOMESTEAD. Abandonment of, shown by records in other suits, when.

In an action involving title and right to possession of real estate, where defendant claimed under a conveyance of an alleged assigned homestead the record of a divorce suit against defendant's grantor, showing that she had become a nonresident and had abandoned the homestead before the conveyance is admissible, and so is the record of a suit by defendants against their said grantor alleging her nonresidence. (*Post*, pp. 41, 42.)

13. EVIDENCE. Part of record is admissible where balance is accounted for, when.

Part of a record is competent and admissible, where the certificate of the clerk accounts for the balance of the record. (*Post*, p. 42.)

Cases cited and approved: *Russell v. Houston*, 115 Tenn., 536.

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FROM GIBSON.

Appeal from the Chancery Court of Gibson County.—
JOHN S. COOPER, Chancellor.

DEASON, RANKIN & ELDER, for complainant.

HARWOOD & CLARK, for defendants.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The object of this bill is to establish complainant's title and right of possession to a tract of land situated in Gibson county and comprising about 130 acres.

Complainant, John M. Grier, claims title to the land under the will of his grandfather, A. M. Grier, who died testate in Gibson county, Tenn., about the 17th day of December, 1885, leaving surviving him as his only heir at law James P. Grier, who was the father of the present complainant. The bill alleges that said will was duly and regularly probated before the county court of Gibson county, Tenn., and duly recorded. A copy of the will was filed as an exhibit to the bill.

The third item of the will of A. M. Grier is in the following language:

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"That I give and bequeath unto my son, James P. Grier, as after all my just debts being settled, all my personal property and real estate, and at his death I direct that my real estate be divided equally among his bodily heirs."

It is alleged in the bill that the James P. Grier referred to in the clause of the will just quoted was the father of complainant, John M. Grier; that the said James P. Grier is dead, and that he died in the month of February, 1889; that the complainant, John M. Grier, is the only child and bodily heir of the said James P. Grier; and that complainant was born on the 19th of March, 1882, in Gibson county, Tenn. It is then alleged that under proper construction of said will James P. Grier, the father of complainant, took a life estate in the tract of land in controversy, and that complainant, as the only bodily heir of the said James P. Grier, was vested under said will with the remainder in fee in said tract of land, and that, said life estate having terminated in February, 1899, by the death of his father, James P. Grier, the complainant became then entitled to the immediate possession of the same; but that the defendants, S. L. Canada and her husband, W. R. Canada, are now and have been since February, 1899, in the possession of said land, exercising dominion over the same, and appropriating the rents and profits thereof to their own use and benefit.

Complainant further states to the court that he was twenty-one years of age on the 19th day of March, 1903,

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and the present bill was filed on the 20th of December, 1905, within three years after he attained his majority. The complainant shows to the court that defendants Canada and wife have claimed said tract under and through a deed executed to them by complainant's father, James P. Grier, on the 10th day of October, 1888; that said deed does not undertake to show what interest the said James P. Grier claimed in said land, but that the said W. R. Canada, at the date of said conveyance, well knew that the said James P. Grier only had a life estate in said property; that, while said conveyance recited the consideration of \$750, the real consideration was much less, and merely a nominal sum; that James P. Grier (or James W. Grier, as the name erroneously appears in the deed) had only a life estate, and could convey no more, and did in fact convey only a life estate.

Complainant further charges that W. R. Canada became involved in debt on the 25th of October, 1889, and made a fictitious conveyance of said land to one J. T. Gordon; that the said J. T. Gordon held the same for some time for the benefit of the said W. R. Canada; that on October 22, 1891, the said J. T. Gordon executed a quitclaim deed to said tract of land to Mrs. S. L. Canada, wife of W. R. Canada; that S. L. Canada held said land until August 10, 1898, when she made some kind of conveyance of the same to her son, W. B. Somers; that the said W. B. Somers pretended to hold the said tract of land for some time, but in fact W. R. Canada and wife, S. L. Canada, were the real beneficiaries of

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the rents and profits during said time; that finally, on the 30th of January, 1905, the said W. B. Somers reconveyed said land to the defendant S. L. Canada, wife of W. R. Canada, and the defendants are now holding said land under that conveyance. The defendants demurred to the bill, assigning for cause that under a proper construction of the will of A. M. Grier, deceased, the said James P. Grier took the absolute fee in said tract of land, and not merely a life estate, as claimed by complainant in the bill. The chancellor overruled said demurrer, and on appeal the decree of the chancellor was affirmed by this court at the April term, 1906. It was adjudged by this court that under a proper construction of said will the said James P. Grier only took a life estate, and thereupon the cause was remanded to the chancery court of Gibson county for answer and further proceedings.

On June 6, 1906, defendants Canada and wife filed their joint and separate answers, in which they admitted the death of A. M. Grier and that James P. Grier was his only child and heir at law. Among other defenses interposed, defendants deny that A. M. Grier disposed of or undertook to devise said tract of land by will, or that he ever executed a will to convey real estate, or that he ever attempted to do so, or that the alleged will could form any link in complainant's alleged chain of title. Further answering on this point, respondents state that shortly after the death of said A. M. Grier said alleged will was attempted to be probated in the county

court of Gibson county as a holographic will; but upon the proof the will was probated simply as a valid will of personal property, and the adjudication of the county court affirmatively shows that it was not and could not be probated as a holographic will, and, if a valid will at all for any purpose, these respondents deny that it was valid as a conveyance of real estate. The alleged probate of said will was made on March 1, 1886.

Since this averment of the answer is based upon the order of the county court probating said will March 1, 1886, it is well at this point to set out said probate order, as follows:

“A paper writing purporting to be the last will and testament of A. M. Grier, deceased, was this day produced in open court, and the handwriting of the said A. M. Grier proven by the oaths of W. J. R. Becton and H. J. Thomas, who, being duly sworn, depose and say that they are well acquainted with the handwriting of said A. M. Grier, and the signature thereto is in his handwriting.

“Whereupon said instrument was admitted to probate as the last will and testament of W. A. Grier, deceased, and ordered put to record.”

It will be observed that the specific objections to this order of probate is that it does not affirmatively appear that the handwriting of the testator was proven by three witnesses, nor does it appear from the testimony of three witnesses that said paper writing was wholly in the handwriting of the testator; but the probate only re-

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cites that two witnesses proved that they were well acquainted with the handwriting of the testator and that the signature to the instrument was in his handwriting. Further it appears that said instrument was admitted to probate as the last will and testament of W. A. Grier, deceased.

It is to be observed, however, that said order of probate opens the recital as follows: "A paper writing purporting to be the last will and testament of A. M. Grier, deceased," etc.

The answer further avers that at the December term, 1905, of the county court of Gibson county, and only a few days before the filing of complainant's bill, complainant, without notice to either of these defendants, went before said county court and undertook to reprobate said instrument as a holographic will. It is admitted that the last order or probate, made at the December term, 1905, of the county court, fully complies with all of the formalities required by law to probate a holographic will; but it is insisted on behalf of the defendants that the county court, having probated this will more than twenty years prior to this time, had no jurisdiction to set aside the former probate upon mere motion of the executor and reprobate said will. Further answering, defendants say that the last action of the county court is void, not only from want of jurisdiction, but because said will is not in the handwriting of A. M. Grier, deceased, unless it is the signature of the said instrument; and it is further charged that the re-

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probate was a fraudulent scheme upon the part of the complainant and the executor to recover the real estate in question from these defendants. It is then averred that no part of the statutory requirements with reference to holographic wills was ever complied with; that the paper writing was not in the handwriting of the testator, nor was the will found among his valuable papers, nor was the handwriting known to be the handwriting of A. M. Grier. It is further charged that the latter action of the county court was procured by fraud and misrepresentations as to the real facts touching the execution of said paper, and was taken by the county court upon *ex parte* proceedings, and is invalid so far as defendants are concerned.

Among other defenses pleaded were the statutes of limitation of three, six, seven and twenty years, the defense of coverture, and a discharge in bankruptcy.

On the issues thus formulated proof was taken, and on the final hearing the chancellor decreed that complainant was entitled to recover possession of said tract of land from the defendants W. R. Canada and his wife, S. L. Canada, and ordered a writ of possession to issue. The chancellor further decreed that the defendants are not entitled to retain possession of the land known as the "Brewer homestead," and particularly described in the decree in *J. T. Carthel et al. v. J. N. Brewer et al.*, and in certain of the conveyances offered in evidence, but that complainant is entitled to recover possession of that portion of said land, and was so entitled

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to recover the same upon the death of James P. Grier in February, 1889.

The chancellor then ordered a reference to the clerk and master to take proof and report as to the rents and profits of said land since 1899, and thereupon the present appeal was prayed by the defendants, which was accordingly allowed by the chancellor in the exercise of his discretion.

The first assignment is: The court erred in decreeing that the paper writing exhibited with the bill, and under which complainant claims, was in fact and in law the last will and testament of A. M. Grier, deceased.

The second assignment is that the court erred in the admission as evidence of the record of probate of said alleged will at the March term, 1886, of the county court of Gibson county. Said record on its face, and said will, showed that no title to said land was or could be communicated to the complainant by or through said will and said probate thereof.

The third assignment of error is that the court erred in the admission of said will and the attempted probate of the same at the December term, 1905, of said county court, as evidence in this cause.

These three assignments of error, presenting cognate questions, will be considered together. The general object of this bill is to establish title to land under a will as a muniment of title. The validity of the probate of that will, as well as the validity of its execution, are both attacked in the answers filed in this cause. It is im-

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portant, therefore, in the investigation of this cause, to state the law applicable in such cases.

The act of 1784, embodied in Shannon's Code, provides as follows:

"Sec. 3929. The probate of wills in the county courts shall be sufficient evidence of a devise of real estate.

"Sec. 3930. Attested copies of such wills or the records thereof by the proper officer may be given in evidence in the same manner as the originals.

"Sec. 3931. But when any fraud is suggested to have been committed in the drawing or obtaining any last will or any irregularity in the executing or attestation thereof, the party making such suggestion may insist upon the original will being produced to the court if the same is to be found."

This act and its construction was before this court in *Weatherhead v. Sewell*, 9 Humph., 272, and *Brown v. Brown*, 14 Lea, 253, 52 Am. Rep., 169. Mr. Pritchard, in his work on Wills and Administrations (section 321 *et seq.*), has a clear and condensed statement of the result of our decisions establishing the practice in such cases:

"Sec. 321. Before the statute on the subject, when a will was relied on as a muniment of title to the lands, the original had to be produced and proved; but the statute permits the use of a certified copy, which may be read upon the probate in the county court. When this was done the parties stood in the same position that they would have stood in provided the original had been

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produced and proved as is required by the common law; that is, the party claiming under a will has made out his case *prima facie*, and those claiming against the will are put upon the defense to show that it is no will, or that the party producing it takes no interest under it. An attested copy of the will, with the probate in the county court, is substituted in the place of the original will and proven in open court *per testes*; but such attested copy, with the probate, is not conclusive, as is the probate of a will in personalty. The statute was intended for the benefit of those contesting the right of the claimant under the will, in order to give them the benefit of any evidence of fraud or irregularity which may appear on the face of the will. The defendant may attack the will, and the rights of those claiming under it, as well and to the same extent as where the original is produced and proved in common-law form upon the trial. But, before the person resisting the claim under the will can require the production of the original, he must suggest that a fraud has been committed in drawing or obtaining it, or that there is some irregularity in the execution or attestation thereof."

It thus appears from the authorities that the heir, in seeking to establish his title to the land in controversy, may proceed upon a certified copy of the will, which, when duly attested, is *prima facie* evidence of the validity of the will; but it is not conclusive. It may be shown that a fraud was committed in drawing or obtaining it, or that it was not formally executed and at-

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tested; but it is not admissible in such a proceeding to try an issue of *devisavit vel non*.

The question first arising is in respect of the validity of the probate of this will at the March term, 1886. As already seen, that probate record is as follows:

"A paper writing purporting to be the last will and testament of A. M. Grier, deceased, was this day produced in open court, and the handwriting of the said A. M. Grier proven by the oaths of W. J. R. Becton and H. J. Thomas, who, being duly sworn, depose and say that they were well acquainted with the handwriting of the said A. M. Grier, and the signature thereto is in his handwriting. Whereupon said instrument is admitted to probate as the last will and testament of A. M. Grier, deceased, and ordered put to record. And thereupon J. C. A. Grier, the executor named in said will, came into court and entered into bond for the sum of \$200, and W. J. R. Becton and J. Y. Mitchell as his sureties, which bond was duly acknowledged in open court, received, and approved by the court, and ordered to be recorded; and thereupon the said J. C. A. Grier took the oath prescribed by law. And accordingly ordered letters testamentary issue."

We are of the opinion that this probate record was fatally defective. While good as a will of personalty, such a probate was wholly insufficient to prove a will of realty. It will be observed that the effort, as disclosed by the probate record, was to prove a holographic will. The probate record fails to disclose that the

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handwriting of the testator was generally known by his acquaintances and that three credible witnesses proved that the writing and every part of it was in his hand. None of the statutory requirements in order to make a valid probate of a holographic will appear in this probate record. Shannon's Code, section 3896.

It is conceded that the re-probate made on the 19th day of December, 1905, supplied all the omissions in the original probate and conformed with all the formalities prescribed by statute for a probate of a holographic will. It is unnecessary to set out at length this re-probate.

It is insisted, however, on behalf of appellants, that the county court, having exhausted its jurisdiction to probate this will at the March term, 1886, had no power to entertain the second probate, except by regular proceedings to probate in solemn form. It is further insisted on behalf of appellants that the probate of the original will at the March term, 1886, of the said court, was an adjudication that the said will was a good and valid will of personalty and an insufficient and invalid will of real estate. Finally, it is said that in no event would the county court have authority or jurisdiction to probate this will again upon mere motion in an *ex parte* proceeding, without petition and without notice.

We are of opinion that the re-probate of the will at the December term, 1905, although nineteen years after the original probate, was authorized by law. In considering this subject Mr. Pritchard says (section 322):

"The power of the county court to revoke a probate

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once granted, although nowhere expressly recognized in the statutes of this State, is a just and necessary power to be implied from the statute conferring the general power to take the probate of wills and grant and revoke letters testamentary and of administration. This power exists in cases where the grounds of objection go to the validity of the probate and involve no contested point of fact necessary to be determined by a jury on an issue of *devisavit vel non*. *Wall v. Wall*, 64 Am. Dec., 147, s. c. 30 Miss., 91. But the power should be cautiously exercised, and it should require a much stronger case to justify the revocation of a probate already granted than merely to show such a state of facts as would justify the rejection of the will in the first instance, since the application for revocation suggests an impeachment of the original proceedings."

Mr. Pritchard in the next section (323) enumerates instances in which the probate of wills has been revoked and the same will re-probated. The author, in section 324, then announces this rule:

"The time within which application for revocation of a probate must be made is probably limited to twenty years in the case of a will of personal estate; but there is probably no limitation in the case of a will of land"—citing *Townsend v. Townsend*, 4 Cold., 70, 94 Am. Dec., 185; *Gibson v. Lane*, 9 Yerg., 475.

The same author in section 316 says:

"There was no limitation at common law, and very

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ancient wills have been admitted to probate; it being understood that not less than thirty years would bar a probate. . . .

"But, when there is a great delay in presenting a will for probate, its probation will not be allowed to affect the operation of the statute of limitations, so as to disturb vested rights protected by the running of the statute." See, also, section 351, *Id.*

It will be observed that the object of the re-probate in the present instance was not to annul the original probate, but was to supply formalities that were omitted in the former order. It was rather an ancillary proceeding than one to destroy the original probate. The re-probate of this will at the December term, 1905, of the county court, was in our opinion clearly authorized, and is sufficient to make out a *prima facie* case in favor of the right of John M. Grier to recover the land in controversy. In the present state of the record, the burden of proof devolved on the defendant and appellant to show that this will was not valid for fraud, accident, or mistake.

We think, however, upon the facts disclosed in this record, appellants are estopped from impeaching the sufficiency of the probate proceedings. The fact is established that appellants have been claiming the land in controversy, under the will thus sought to be impeached, for nearly twenty years. It appears that on October 25, 1889, the appellant W. R. Canada filed a

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bill concerning the land in controversy in which he made the following allegation:

"The said Abner M. Grier, the former owner of said land, died in February, 1886, leaving his last will and testament, which was duly probated in the county court of Gibson county, Tenn. (the place of his death), shortly thereafter, and a certified copy of the same will be filed on or before the hearing as evidence. By this will the land aforesaid was devised to his son and only heir at law, complainant J. P. Grier, and on the — day of —, 188—, the said complainant J. P. Grier sold and conveyed the said land to complainant W. R. Canada," etc.

It thus appears that J. P. Grier was the complainant in this bill, and that he claimed to have acquired the title to this land under the will of his father. W. R. Canada joined in these allegations, claiming under said will, and through J. P. Grier as devisee under the will. It appears that this bill was still pending when the land in controversy was re-conveyed to the defendant Mrs. S. L. Canada by T. J. Gordon, thus constituting a *lis pendens*. But the following additional fact appears in the record, to-wit: On March 10, 1894, W. R. Canada and his wife, Mrs. S. L. Canada, filed another bill in the chancery court of Gibson county touching the same land in controversy. In this bill Mrs. S. L. Canada joins and quotes with approval the allegations already quoted in the former bill concerning the will and its probate. The former bill was substantially quoted, and

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it is then recited that Mrs. Canada, together with her husband, "adopt the said charges of the said bill hereinbefore quoted, and do adopt said bill."

Thus we find solemn admissions by both of these appellants in a judicial proceeding touching the title and possession of this land. In one bill W. R. Canada claimed under the will of A. M. Grier, and in the second bill his wife joined him in reiterating the same claim. It was alleged by both that A. M. Grier died leaving a last will and testament, and that the same was duly probated in the county court of Gibson county, and that the land involved in this suit was devised to his son, J. P. Grier. These allegations are sworn to by both of these appellants. These allegations were made under oath in 1888, and again in 1894.

A party will not be permitted to deny in one proceeding facts which he has admitted or averred in his solemn pleadings under oath in another proceeding. *Chilton v. Scruggs*, 5 Lea, 318.

Where certain statements are made by a party in a sworn bill, he is estopped from denying those statements in any subsequent proceeding, or from asserting the contrary to be true. *Stephenson v. Walker*, 8 Baxt., 289. *Hamilton v. Zimmerman*, 5 Sneed, 39.

The same rule of estoppel applies where a party has testified to certain facts in a deposition taken in the course of judicial proceedings. *Stillman v. Stillman*, 7 Baxt., 175; *Cooley v. Steele*, 2 Head, 605.

We are therefore of opinion that appellants, on ac-

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count of the recitals and solemn admissions under oath in their former pleadings, are now estopped to deny the valid execution of the will of A. M. Grier or the regularity of the probate proceedings.

Counsel for appellants, in the course of his argument, invokes the doctrine of innocent purchaser on behalf of his clients; but this defense is not made either by the answer or special plea. *Dunham v. Harvey*, 111 Tenn., 620, 69 S. W., 772. Nor was there any error in the action of the chancellor in declining to permit the plea of innocent purchaser to be filed after all the proof had been taken and the case was about to be tried. This was a matter that addressed itself to the sound discretion of the chancellor, and his action in disallowing the plea will not be reviewed.

The next assignment is that the chancellor erred in decreeing that complainant was the owner of the homestead in the sixty-five acres of land assigned to Brewer and wife. It is said the chancellor should have decreed that Mrs. Canada was the owner of said homestead. In this connection will be considered the following assignments of error:

(a) The court erred in excluding deed from J. L. Clark and wife to Mrs. S. L. Canada, conveying said homestead.

(b) The court erred in the admission of the record in the case of *W. R. Canada v. Clark et al.* from the chancery court of Gibson county.

(c) The court erred in the admission of the record in

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the case of *Gravitt v. Gravitt* from the chancery court at Trenton, Tenn.

The homestead in question, comprising about sixty-five acres, was assigned to Brewer and wife in the year 1875, in the case of *Carthel v. Brewer*, pending in the chancery court of Gibson county. It was a part of the 160 acres of land in controversy, and the balance of the tract, including the remainder interest in the homestead, was sold to S. A. Grier. In November, 1875, S. A. Grier, for the consideration of \$1,000, executed a quitclaim deed to A. M. Grier covering his interest in the 130-acre tract of land. It thus appears that A. M. Grier became the owner of the 130-acre tract of land subject to the homestead interest of Brewer and wife, and he still owned said property at the date of his death.

It further appears that, after the assignment of the homestead to Brewer and wife, Mrs. Brewer died, and shortly thereafter Mr. Brewer entered into another marriage. In 1883 Mr. Brewer died, and his widow, in the latter part of 1885, entered into a marriage with one Gravitt. In 1886 Gravitt procured a divorce, and subsequently, in the year 1886 or 1887, Mrs. Gravitt, formerly Mrs. Brewer, entered into a marriage with one Clark. In 1894 Clark and his wife, being in possession of the homestead which had been originally assigned to Brewer and wife, sold and transferred the same to Mrs. S. L. Canada for the consideration of \$225. It appears that Mrs. Canada held and occupied this homestead un-

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der the conveyance from Clark and wife for nearly twelve years prior to the filing of the bill in this cause.

As already seen, the chancellor decreed that complainant was entitled to recover possession of this homestead, and that he was so entitled to the same upon the death of J. P. Grier, in February, 1899.

When the defendants offered in evidence the deed of J. L. Clark and wife to S. L. Canada, objection was made on behalf of complainant to said deed, for the reason it appeared from the proof that the said M. J. Clark was divorced from her husband William Gravitt, on account of adultery with J. L. Clark, and it further appeared that at the time this paper was executed she was still living in adultery with the said Clark, and that it thus appeared from the proof that said deed was made in violation of the nonalienation statute of Tennessee, and that the alleged deed was absolutely void by the express provisions of the statute. This objection was sustained by the court, and said deed was excluded, and not permitted to be read in evidence, to which action of the court the defendants excepted at the time.

The section of the Code invoked is found at section 4227, Shannon's Code, as follows:

"After a divorce for adultery on the part of the wife, if she afterwards cohabit at bed and board with the adulterer, she shall be incapable of alienating directly or indirectly any of her lands; but all deeds, wills, appointments, and conveyances thereof, by her made, shall be void and of no effect; and after her death the same

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shall descend, and be subject to distribution, as if she had died seized and possessed thereof intestate."

In *Prater v. Prater*, 87 Tenn., 78, 9 S. W., 361, 10 Am. St. Rep., 623, it was held that a woman who without cause had deserted her husband, and eloped with another man, and taken up permanent residence with him in another State, and there continued to live in adultery with him until after her husband's death, forfeits her right as widow in the lands owned by her husband at his death. See, also, *Freeman v. Freeman*, 111 Tenn., 151, 76 S. W., 825.

It will be observed in the present case that these provisions of the law are invoked to work a forfeiture of the homestead right of Mrs. Clark upon the ground of her alleged adultery with J. L. Clark while she was wife of Gravitt. Counsel for complainant also relied on the fact that an abandonment of this homestead by Mrs. Gravitt, or Mrs. Clark, is disclosed by this record. It is well settled that our homestead and exemption laws are for citizens only, and not for nonresidents, and the homestead is abandoned or forfeited when the occupant becomes nonresident. *Carrigan v. Rowell*, 96 Tenn., 185, 34 S. W., 4; *Farris v. Sipes*, 99 Tenn., 300, 41 S. W., 443; *Coile v. Hudgins*, 109 Tenn., 220, 70 S. W., 56.

It is also well settled that homestead, when assigned, is transferable as a life estate. *Cowan v. Carson*, 101 Tenn., 523, 50 S. W., 742; *Delk v. Yelton*, 103 Tenn., 480, 53 S. W., 729; *McCrae v. McCrae*, 103 Tenn., 721, 54 S. W., 979.

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Since the act of 1879 (Laws 1879, p. 213, c. 171) the right of homestead is not dependent upon occupancy, and hence assigned homestead is not abandoned by removal from the premises, except by permanent removal beyond the limits of the State. *Briscoe v. Vaughn*, 103 Tenn., 311, 52 S. W., 1068.

Mrs. S. L. Canada testified that Mrs. M. J. Gravitt lived with William Gravitt but a few days, when she eloped with Clark and removed to the State of Missouri, where she lived with Clark for several years. It appears from the record that William Gravitt filed a bill for divorce against his wife, Mrs. M. J. Gravitt, and there was publication for her as a nonresident. It was also adjudged in that case that Mrs. Gravitt had committed adultery with J. L. Clark while the wife of Wm. Gravitt.

We are of opinion that the homestead was abandoned and forfeited by Mrs. Clark in 1886, when she became a nonresident of Tennessee and eloped with J. L. Clark to Missouri, where she resided for several years.

It does not affirmatively appear from the record that William Gravitt was living at the date of the marriage of his divorced wife with J. L. Clark, nor does it appear that he was living at the date of the deed by J. L. Clark and wife, conveying this homestead to Mrs. S. L. Canada. It does appear that William Gravitt was living when the divorce was granted, and in the absence of proof the presumption of continued life would arise. The record of the divorce proceeding by William Gravitt against M. L.

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Gravitt, his wife, was properly admitted in evidence, and the record shows that Mrs. Gravitt had become a nonresident of the State of Tennessee. It is true the whole of that record was not produced; but a certificate of the clerk and master accounts for the absence of the balance of the record, and renders that part of it adduced competent. *Russell v. Houston*, 115 Tenn., 536, 91 S. W., 192.

Mrs. S. L. Canada and her husband, in a bill filed by them in 1894 against Clark and wife for the purpose of avoiding the homestead, alleges that Mrs. Clark left this tract of land and moved to Missouri "with no intention of ever returning to it or using it as her home." Again they allege "she voluntarily and permanently deserted her husband and home, eloped with another man, and lived with him out of the State for a long period of years." It is further alleged in that bill that the return of Mrs. Clark to Tennessee and to this tract of land "was an afterthought."

No evidence is introduced on behalf of appellants to explain or overthrow the evidence on the part of the complainants tending to show that Mrs. M. J. Gravitt was a nonresident of the State of Tennessee.

We think it unnecessary to pass upon the question of the forfeiture of this homestead on account of the adultery of Mrs. Gravitt with J. L. Clark, but base our decision of the forfeiture of homestead exclusively upon the proof of the nonresidence of Mrs. Gravitt.

Affirmed.

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LENA HUMPHREY *et al.* v. A. GODSEY.

. (*Jackson*. April Term, 1907.)

1. **COURT OF CIVIL APPEALS.** Jurisdictional amount is determined by amount actually in controversy upon appeal.

The appellate jurisdiction as between the supreme court and the court of civil appeals, when dependent upon the amount involved, is determined by the amount really or actually in controversy in the appellate court, and not by the amount involved in the court below.

Acts cited and construed: Acts 1907, ch. 82, sec. 7.

2. **SAME.** Same. Broad appeal will not give supreme court jurisdiction, if controverted amount is less than the jurisdictional amount.

The appellant cannot appeal from that part of the decree of the chancery court which was in his favor, merely for the purpose of giving the supreme court jurisdiction. A broad appeal does not open the whole controversy involved in the chancery court so as to give the supreme court jurisdiction, where the chancery decree eliminated everything in favor of the appellant, except the sum of one hundred and fifty dollars.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
F. H. HEISKELL, Chancellor.

W. H. COX and BYARS, KING & CAPELL, for complainants.

J. P. SYKES, for defendant.

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MR. JUSTICE NEIL delivered the opinion of the Court.

The question to be determined in this case is whether this court has jurisdiction of the controversy, or whether the case falls within the jurisdiction of the court of civil appeals. Section 7 of the act [published Acts 1907, ch. 82], creating that court provides:

“That the jurisdiction of said court of civil appeals shall be appellate only, and shall extend to all cases brought up from courts of equity or chancery courts, except cases in which the amount involved, exclusive of costs, exceeds one thousand dollars, and except cases involving the constitutionality of the statutes of Tennessee, contested elections for office, State revenue, and ejectment suits, and to all civil cases tried in the circuit and common law courts of the State, in which appeals in the nature of writs of error, or writs of error may be applied for, for the purpose of having the action of said trial court reviewed. In all cases in which appellate jurisdiction is herein conferred upon said court of civil appeals, the appeals and appeals in the nature of writs of error from the lower court shall be taken directly to said court of civil appeals; and said court, or any judge thereof, is hereby given the same power to award and issue writs of error, *certiorari* and *supersedeas*, which the supreme court has heretofore had in such cases, returnable to said court of civil appeals. The practice in such cases in said court shall be the same as is now prescribed by law for the supreme court. In all cases in which appellate jurisdic-

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tion is not conferred by the terms of this act upon said court of civil appeals, appeals therefrom shall be direct to the supreme court, and in such cases, writs of error, *certiorari* and *supersedeas* shall be issued by and made returnable to the supreme court, as is now provided by law; and in such cases the supreme court shall have exclusive jurisdiction, and shall try and finally determine the same, and shall not after this act takes effect, assign the same for trial by the said court of civil appeals."

The bill in this case alleges that the complainant, Lena Humphrey, while yet a minor, purchased from the defendant, Godsey, a lot in the city of Memphis, for the consideration of \$1,700, and paid him therefor, \$150 in cash, and executed sundry notes to cover the deferred payments; that she desired, on the ground of her infancy, to disaffirm the said contract, to have the notes canceled, and the \$150 in cash repaid to her.

The answer interposes the defense that the complainant had induced the defendant to execute the deed, and to receive the money and the notes by stating to him that she was of full age, and that she had thereby practiced a fraud upon him.

The chancellor rendered a decree allowing the disaffirmance of the sale, and canceling all of the notes, but he refused to grant a decree for the return of the money.

The complainant prayed a broad appeal from the decree of the chancellor, but in this court, assigned

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errors only upon the action of the chancellor in refusing to decree a repayment of the \$150 cash, and upon certain errors in the admission of evidence. The defendant assigned errors only upon the disposition made of the costs.

The question to be determined is whether the matter in controversy was less than \$1,000. The complainants insist that, inasmuch as they prayed a broad appeal, the whole controversy set forth in the bill is before us, and the amount of the consideration money being \$1,700, the amount involved is within our jurisdiction. We are of the opinion, however, that the complainants could not appeal from that portion of the decree which was in their favor, merely for the purpose of giving this court jurisdiction. The jurisdiction is determined by the amount *bona fide* in controversy in the appellate court, not the amount in the court below.

The real matter in controversy, on the present appeal, is the action of the chancellor in refusing to decree a return of the \$150 composing the cash payment. This being true, the case falls within the jurisdiction of the court of civil appeals, and must be stricken from the docket of this court, and it is so ordered.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, SPECIAL SEPTEMBER TERM, 1907.

STATE OF TENNESSEE *v.* MUNCIE PULP COMPANY *et al.**

(Jackson. Special September Term, 1907.)

1. STATE BOUNDARIES. Western boundary of Tennessee defined.

The western boundary line of the State of Tennessee is the "middle of the Mississippi river" as it ran in 1763, as declared and fixed by treaties and legislative enactments. (*Post*, pp. 64, 65, 68, 69, 70, 71, 75, 76, 109.)

*As to title to land under water, see note to *Goff v. Cougle* (Mich.), 42 L. R. A., 61.

*As to title to islands, see note to *Holman v. Hodges* (Iowa), 58 L. R. A., 673.

*As to effect of sudden submergence upon title to land, see note to *Chicago v. Ward* (Ill.), 38 L. R. A., 849.

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Statutes, treaties, etc., cited: 3 Jenkinson's Treaties, 177; 2 Cobb & Haywood's Compilation, pp. 1, 7-10; 1 Stat., chs. 6 and 47; 8 Stat., 81, 82.

Constitution cited and construed: Art. 1, sec. 31.

Cases cited and approved: Iowa v. Illinois, 147 U. S., 2; Louisiana v. Mississippi, 202 U. S., 41.

2. **SAME.** Same. Congress has no power to change State boundaries.

The western boundary line of the State of Tennessee, at the time of its admission into the union as a State in 1796 (1 Stat., ch. 47), being fixed as the "middle of the Mississippi river" as it ran in 1763, the designation of the eastern boundary line of the State of Arkansas as the "middle of the main channel of the Mississippi river," made in the act of congress, at the time of its admission into the union as a State in 1836 (Stat., ch. 100), could not have been intended to designate a different boundary line than that of Tennessee as it then existed, because congress had no power to change the boundaries of Tennessee as fixed by it when that State was admitted to the union in 1796. (*Post*, pp. 66-69.)

Constitution of the United States cited and construed: Art. 4, sec. 3.

Case cited and approved: Louisiana v. Mississippi, 202 U. S., 40.

3. **SAME.** Same. Same. Main channel means the larger channel, where there are two or more channels.

The words "main channel" used in the designation of the eastern boundary line of the State of Arkansas as the "middle of the main channel of the Mississippi river" were evidently intended to make the common boundary more definite by designating the larger channel, where there existed two or more channels, on account of the numerous islands to be found in the river. (*Post*, pp. 68, 69.)

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4. **STREAMS.** Channel and bed of a river mean the same thing, and mean the depression in which the water flows.

The channel of a river and the bed of a river ordinarily mean the same thing, and are understood to describe that depression of the earth's surface in which the waters of the stream are confined and flow in its ordinary stages, unaffected by freshets or droughts. (*Post*, p. 72.)

Cases cited and approved: *Branham v. Turnpike Co.*, 1 Lea, 704; *Howard v. Ingersoll*, 13 How. (U. S.), 381; *Alabama v. Georgia*, 23 How. (U. S.), 505; *Houghton v. Railroad*, 47 Iowa, 370; *Bridge Co. v. Dubuque*, 55 Iowa, 558; *Cessill v. State*, 40 Ark., 504; *Railroad v. Ramsey*, 53 Ark., 314; *Stover v. Jack*, 60 Pa., 339; *Lux v. Haggin*, 69 Cal., 417; *Larreebee v. Cloverdale*, 131 Cal., 96; *Benjamin v. River Improvement Co.*, 42 Mich., 628.

5. **INTERNATIONAL LAW.** Not to annul agreement of the parties, when.

General rules of international law cannot be invoked, where the matter in question has been settled otherwise by the parties in interest, either by agreement, convention, acquiescence, or long and undisturbed occupancy and possession. (*Post*, p. 91.)

6. **RULES OF PROPERTY.** Construction as to the meaning of the "middle of the Mississippi river" has become a rule of property.

The construction of the words "middle of the Mississippi river" to mean a line along the middle of the main channel or bed of the river equidistant from the visible, defined, and substantially established banks within which the waters are confined and flow in their natural and ordinary stages, and not the middle of the channel of commerce, has become a rule of property and should not be disturbed. (*Post*, pp. 91-93.)

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7. NAVIGABLE STREAMS. Right of navigation by both States in a river separating them.

Where a navigable river constitutes the boundary line between two States, the middle of the channel separating their respective jurisdictions as defined in the first and tenth headnotes, both are presumed to have the free use of the whole of it for the purposes of commerce. The whole river is of right common to both nations as a public highway. (*Post*, pp. 93, 94.)

Cases cited and approved: *The Apollon*, 9 Wheat. (U. S.), 362, 371; *Handly v. Anthony*, 5 Wheat. (U. S.), 374.

8. MISSISSIPPI RIVER. Free navigation secured by treaties, acts of congress, and State constitutions.

The free navigation of the Mississippi river by the citizens of the United States was expressly provided for and preserved in the treaty made by the United States with Great Britain in 1783, and again in that made by the United States with Spain in 1795. This right of navigation has been frequently declared by acts of congress, and is asserted in the constitutions of all the States bordering on said river. The right is so well established that no possible apprehension can be entertained that it will be interfered with. (*Post*, p. 94.)

Constitution cited and construed: Art. 1, sec. 29.

Numerous acts of congress cited on page 94.

9. SAME. Same. Free navigation secured by the commerce clause of the federal constitution.

The commerce clause of the constitution of the United States, all other things aside, affords ample protection to the right of every citizen to the free navigation of the river, whether the current be in one State or another, without fear of hindrance or burdens imposed by such States. (*Post*, pp. 94, 95.)

10. STATE BOUNDARIES. Western boundary of Tennessee is a line in the middle of the Mississippi river equidistant from its banks.

The western boundary line of the State of Tennessee, declared and fixed by treaties and legislative enactments (as shown in

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the first headnote) to be the "middle of the Mississippi river," means a line along the middle of the main channel or bed of the river equidistant from the visible, defined, and substantially established banks within which the waters are confined and flow in their natural and ordinary stages, and does not mean the center of that part of the river which is deepest, and constitutes the channel of commerce. (*Post*, pp. 69-95.)

Acts cited and construed: Acts 1903, ch. 420.

Cases cited and approved: *Branham v. Turnpike Co.*, 1 Lea, 706; *Cessill v. State*, 40 Ark., 501; *Jones v. Soulard*, 24 How. (U. S.), 41; *School v. Risley*, 10 Wall. (U. S.), 91; *Missouri v. Kentucky*, 11 Wall. (U. S.), 395; *St. Louis v. Rutz*, 138 U. S., 226; *Nebraska v. Iowa*, 143 U. S., 359, 361, 367; *Missouri v. Nebraska*, 196 U. S., 23; *Myers v. Perry*, 1 La. Ann., 372; *Morgan v. Reading*, 3 Smedes & M. (Miss.), 366; *Bridge Co. v. Dubuque Co.*, 55 Iowa, 558.

Cases cited and distinguished: *Iowa v. Illinois*, 147 U. S., 1; *Buttenuth v. Bridge Co.*, 123 Ill., 535.

11. SAME. Same. Boundary line between Tennessee and Arkansas settled by convention, decision, legislation, and other acts and acquiescence.

The boundary line between the States of Tennessee and Arkansas, as fixed and defined in the first and tenth headnotes, has been settled by the duly constituted authorities of said States by judicial decisions, legislation, and other authorized official actions, long acquiescence, the exercise of jurisdiction unchallenged, and other acts amounting to an agreement or convention. The establishment of the boundary line between said States in such manner is binding on them, and others cannot be heard to complain. (*Post*, pp. 72, 73, 95, 96.)

Acts cited and construed: Acts 1903, ch. 420.

Cases cited and approved: *Cessill v. State*, 40 Ark., 501; *Indiana v. Kentucky*, 136 U. S., 479.

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- 12. NAVIGABLE STREAMS.** Tennessee acquired title to soil to the center of the Mississippi river.

Tennessee acquired title to all the soil under the water of the Mississippi river to the limits of her jurisdiction, for the reason that the soil under the water of a navigable river, as well as the water, is held by the State for the use and in trust for the public, so long as the river continues to be navigable. (*Post*, p. 96.)

- 13. SAME.** Grants by the United States on navigable streams are limited by high water mark, and the soil between that and the middle of the river is vested in the State.

Grants made by the United States for its lands lying upon navigable streams to private parties are limited by high water mark, and the soil between that and the river and under the waters is vested in the State in which it lies. The State may dispose of this property at its discretion, subject to the general control of congress over all navigable waters. (*Post*, pp. 96-99.)

Case cited and approved: *Hardin v. Jordan*, 140 U. S., 371, 372, and citations.

- 14. SAME.** State grants extend to low water marks only, and the title to the bed of the stream remains in the State.

In Tennessee it has been uniformly held that grants for lands lying upon navigable streams extend to ordinary low water mark only, and that the title to the bed of the stream remains in the State. (*Post*, pp. 99, 100.)

Cases cited and approved: *Martin v. Nance*, 3 Head, 649; *Holbert v. Edens*, 5 Lea, 204; *Posey v. James*, 7 Lea, 98; *Goodwin v. Thompson*, 15 Lea, 209; *Stockley v. Cissna*, 119 Fed., 829; *Taylor v. Commonwealth*, 102 Va., 759; *Holman v. Hodges*, 112 Iowa, 714.

- 15. SAME.** Islands formed in navigable streams belong to the State.

It is well established law that when the waters recede or land is formed upon the bed of navigable rivers, as in case of islands,

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the property in such land is in the State to be disposed of by it as its authorities may determine and direct. (*Post*, pp. 100-103.)

Case cited and approved: *Packer v. Bird*, 137 U. S., 666-672; *Hardin v. Jordan*, 140 U. S., 371, 372; *Morris v. Brooke* (Del.), cited in *Mulry v. Norton*, 53 Am. Rep. 215, note.

16. **SAME.** Land forming in the Mississippi river east of the State's western boundary belongs to the State, when.

The soil under the Mississippi river, east of the western boundary of the State of Tennessee belongs to that State, and whenever the water ceases to flow over it, and it is no longer suitable or required for the purposes of navigation, if not done imperceptibly and in process of accretion, it may be taken in possession, and disposed of by the State as her authorities may see fit. (*Post*, p. 103.)

17. **STREAMS.** Change of channel by erosion and accretion.

Where the change in the channel of a river is made insensibly, by gradual and imperceptible washing away of one shore and the formation in like manner upon the other shore, it is said to be "by erosion and accretion." (*Post*, pp. 103, 124.)

18. **SAME.** Change of channel by avulsion.

Where the change to the channel of a river is made suddenly and violently, and is visible, and the effect is certain, it is said to be by avulsion. (*Post*, pp. 61, 103, 104.)

19. **SAME.** Effect of alteration of channel by erosion and accretion and by avulsion.

Where the boundary line between individuals, as well as States and nations, is marked by a stream, and the location of the stream is altered by erosion and accretion, it continues to be the boundary line; but when the alteration occurs as the result of an avulsion, no change is made, but the limits of private estates or national territory and jurisdiction remain as before. (*Post*, pp. 104-110, 124.)

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Cases cited and approved: *Moss v. Gibbs*, 10 Helsk., 283; *Posey v. James*, 7 Lea, 98; *Missouri v. Kentucky*, 78 U. S., 410; *Indiana v. Kentucky*, 136 U. S., 508; *Nebraska v. Iowa*, 143 U. S., 360, and citations; *Missouri v. Nebraska*, 196 U. S., 23; *Stockley v. Cissna*, 119 Fed., 812; *Rees v. McDaniel*, 115 Mo., 145; *Holbrook v. Moore*, 4 Neb., 437; *Collins v. State*, 3 Tex. App., 323; *Buttenuth v. Bridge Co.*, 123 Ill., 546.

20. SAME. Change in the bed of the Mississippi river that was an avulsion, not changing State boundary.

The change made in its channel by the Mississippi river in 1876 at Centennial Cut-Off was an avulsion, and the boundary line between the States of Tennessee and Arkansas remained where it was originally fixed, in the middle of the abandoned channel, and the rights of individuals who owned lands lying and abutting upon it remained as before the formation of the new channel, for the reason that the change was visible, accompanied with great and uncontrollable force and violence, and occurred within less than two days, with certain and inevitable ultimate effects, shortening the river nearly twenty miles, occupying nearly two thousand acres in the new bed of the usual width of the river. (*Post*, pp. 61, 103, 104, 109, 110.)

21. BOUNDARIES. Presumption of permanency.

The presumption is in favor of the permanency of boundary lines, and the burden of proof is upon the party averring that the location of a line has been changed by the action of the forces of nature. (*Post*, pp. 112, 122.)

22. STREAMS. Evidence insufficient to show accretions.

Evidence stated, reviewed, and held not to show accretions to Dean's Island previous to 1876. (*Post*, pp. 104-122.)

23. SAME. Filling up of old channel is not by accretion, when.

The doctrine of accretions has no application to the filling up of the old channel of a stream, abandoned by the stream for a new one, as the result of an avulsion. (*Post*, pp. 122-130.)

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Cases cited and approved: *Missouri v. Kentucky*, 11 Wall. (U. S.), 395; *Indiana v. Kentucky*, 136 U. S., 479; *Nebraska v. Iowa*, 143 U. S., 360; *Willey v. Lewis*, 28 Wkly. Law Bul., 104 (Ohio); *Hughes v. Birney*, 107 La., 664; *Mulry v. Norton*, 100 N. Y., 426.

24. SAME. Land lost by submergence regained by reliction; land eroded restored by accretion.

Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. (*Post*, pp. 130, 131.)

Cases cited and approved: *St. Louis v. Rutz*, 138 U. S., 226-246; *Hardin v. Jordan*, 140 U. S., 382; *Stockley v. Cissna*, 119 Fed., 831; *Mulry v. Norton*, 100 N. Y., 426; *Morris v. Brooke* (Del.), cited in *Mulry v. Norton*, 53 Am. Rep., 215, note; *Hughes v. Birney*, 107 La., 664.

25. BOUNDARIES. Line between Tennessee and Arkansas established in middle of old channel as in 1823.

The boundary line between the States of Tennessee and Arkansas is declared to be a line to be run along the old channel midway between the banks as they existed in 1823, as shown by the Humphreys map reproduced on page 60, as this is the earliest record of the location of the banks, and there is no evidence of their location in 1763. (*Post*, pp. 109, 110. 131-133.)

26. CHANCERY PLEADING AND PRACTICE. Supreme court may give permission to amend bill upon remandment after overruling plea in abatement.

When the plea in abatement to the jurisdiction of the court is heard upon issue and evidence, and is sustained by the chancellor, but is overruled by the supreme court, and the case is remanded for hearing upon answer, the supreme court may direct that, if it is desired, the bill may be amended so as to make the proper allegations to entitle complainant to recover other lands under the principles settled in the case. (*Post*, pp. 56-52, 133, 134.)

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FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
F. H. HEISKELL, Chancellor.

ATTORNEY-GENERAL CATES and CARROLL, MCKELLAR,
BULLINGTON & BIGGS, for the State.

R. G. BROWN and THOS. W. BULLITT, for Muncie Pulp
Co.

CARUTHERS EWING, for Cissna.

MR. JUSTICE SHIELDS delivered the opinion of the
Court.

This suit was brought by the State of Tennessee against W. A. Cissna and the Muncie Pulp Company, in the chancery court of Tipton county, Tennessee, to recover about one thousand acres of land, charged in the bill to be situated in that county and then in the possession of W. A. Cissna, who claimed to own the same in fee, and the Muncie Pulp Company, his lessee. An injunction was also asked to stay waste in cutting and removing timber, being committed by the Muncie Pulp Company. These defendants made defense by plea in abatement to the jurisdiction of the court, in

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that the lands sued for were not situated in the State of Tennessee, but in the State of Arkansas. The defendant Cissna in his plea says that these lands were formerly, about 1823, on the Tennessee side of the middle of the Mississippi river, which, as the river then ran, was and is the boundary line between Tennessee and Arkansas, but by gradual and imperceptible erosion upon the Tennessee bank, and accretion upon that of Arkansas, they became in the course of time and are now within and a part of the territory of the State of Arkansas. The defendant Muncie Pulp Company simply says the lands are not within the State of Tennessee, but within the boundaries and a part of the State of Arkansas. The defendants also filed answers to complainant's bill under an agreement of record that in so doing they would not waive their pleas to the jurisdiction of the court. The case, after issue, was by consent of parties transferred from the chancery court of Tipton county to that of Shelby county, and there heard by the chancellor upon the pleas in abatement and the proof offered by the parties upon the issues thus made. The chancellor was of the opinion that the case was with the defendants, and sustained the pleas and dismissed the bill. Complainant has appealed from this decree and assigned error.

The case is before us alone upon the question of jurisdiction presented by the pleas in abatement, but the decision of this question necessarily involves the title of the complainant to the lands sued for, since she

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claims them as a sovereign State, under the same grants, treaties, and legislation by which its western boundary is defined, declared, and established. The location of the boundary line between Tennessee and Arkansas, and the right of the former to recover the lands in question, are practically the same question, and will therefore be considered together.

The lands described in the bill and sought to be recovered confessedly were at one time, about 1823, under the waters of the Mississippi river. This is admitted in the plea of W. A. Cissna, and is so clearly and conclusively established by the proof, that it is not now controverted by any one. The Mississippi at this point at that time and for many years thereafter made a great bend, forming a tongue or peninsula extending northwestward from a direct north and south line, the distance around which was more than twenty miles, but across the neck connecting it with Tennessee less than two miles. This peninsula was separated by McKenzie's Chute, an arm of the river, and the northern part was known as "Island 37." The whole, called "Devil's Elbow," was part of Tipton county, Tennessee. The river began this bend at the southern point or apex of Dean's Island, which was between the main channel of the Mississippi river and Barnay's Chute, and is a part of the territory of Arkansas, and property of the defendant W. A. Cissna, and ran first westward, then northward between Dean's Island and the main land of the peninsula and Island 37, then westward and

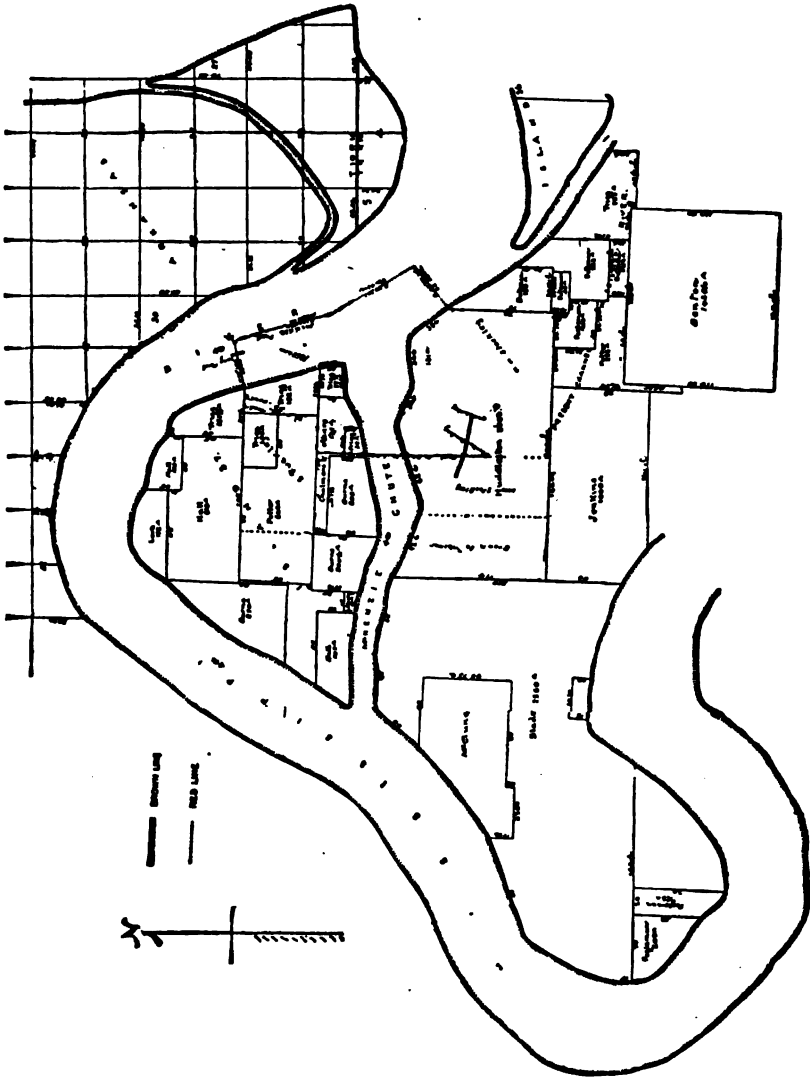
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southward around Island 37, then in a northeastern direction until it came within about two miles of the place where it started northward, and then resumed its general course southward. The main channel of the river was at this time southwest and west of Dean's Island, about one mile, or a little less, in width. The location of the islands here mentioned and the course of the river are difficult to describe, and can best be seen and understood from an inspection of a map made by Maj. J. H. Humphreys, a civil engineer, a copy of which is exhibited with complainant's bill and here reproduced. See the following page.

The river continued to run between Dean's Island and the peninsula and Island 37 opposite it until March 7, 1876. Considerable changes, however, had taken place in its bed at this point in the meantime. The width of the channel, by erosion and caving in of the Tennessee bank south, southwest, and west of Dean's Island along the main land and Island 37, had increased from its former width to that of one and one-quarter miles or one and one-half miles, and a towhead, which seems to be a formation upon the bottom of the river, appearing at times, but not always above its surface, and neither a bar, nor yet land, had appeared off the apex of Dean's Island, a navigable chute running between it and the island, and a sand bar and mud flats, only seen in very low water, had also formed in the river near the bank of that island, perhaps below the towhead. A steamboat reconnaissance of the river,

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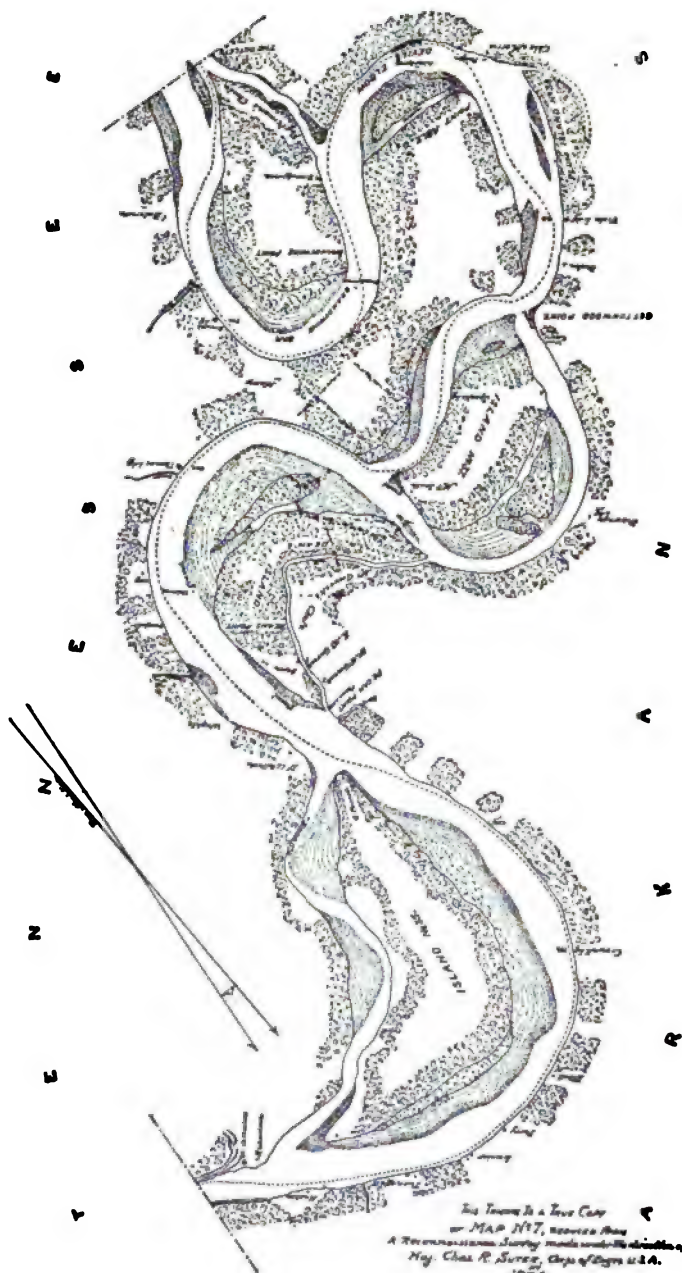
Humphrey's Map, showing conditions of river in 1823 in brown. ~~same~~



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under the direction of the War Department of the United States, was made by Col. Suter in 1874, and a map of the place which we are now describing was prepared by him or his assistants and is in evidence. There is no proof of any material changes in the river between 1874 and 1876, and this map, while it is not shown to be altogether correct and accurate, may be said to present the general situation as it existed in the latter year. It is also here reproduced. See the following page.

Upon the date referred to, March 7, 1876, the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck opposite the apex of Dean's Island, then reduced in width to about a mile, which new and shorter channel, thus made, it continues to occupy to this time. The new channel was called the "Centennial Cut-off," and the island made by it "Centennial Island." The change of the channel, as stated, was sudden and violent. About two thousand acres of valuable cultivated lands were swept away, with the farmhouses, ginhouses, and other improvements upon them, in a few hours, and the inhabitants with difficulty saved their lives and personal property. The old channel around the bend of the elbow was abandoned by the current of the river, but remained, for a few years, covered with dead water, becoming a lake or lagoon. It was no longer navigable, except in time of high water for small boats, and this continued only for a short time. The fall in the river around the elbow, from six to eight feet, was all con-



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densed in the one mile of the cut-off, and made a strong current there. This, of course, drew the water from the old channel rapidly, and greatly reduced its depth. The old bed immediately began to fill with sand, sediment, and alluvial deposits, and bars formed in it. It became dry land, cottonwood and willow trees began to grow upon it, and it is now for the most part covered with valuable timber and susceptible of cultivation. It is very valuable, both on account of the timber growing upon it and the fertility of its soil. This suit is brought to recover a portion of the main channel lying between the middle of it, as it existed when the cut-off took place, and the Tennessee bank. The claim of the State is that its sovereignty and territory extended to a line drawn along the middle of the Mississippi river, and that, it being a navigable stream, it had title to the lands within its boundaries covered by the waters of the river, and, when the waters abandoned the bed, they remained its property, and it is entitled to recover them in this suit.

We will now proceed to consider this boundary of Tennessee and the title which she acquired and has to the lands claimed. The territory constituting the State of Tennessee, with perhaps small areas upon her northern and southern boundaries, acquired by conventions with adjoining States, was originally the western part of the colony and State of North Carolina, and her boundaries are the same as they were before ceded by that State. Charles II of England, in the sec-

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ond and effective royal charter of North Carolina, granted June 30, 1667, to Edward, Earl of Clarendon, and his associates, described the territory granted as "all that portion, territory or tract of land situated and being within our dominion of America aforesaid, extending north and eastward as far as the north end of Currituck river or inlet upon a straight westwardly line to Wyonoke creek, which lies within or about the degrees of thirty-six and thirty minutes northern latitude; and so west in a direct line as far as the south seas, and south and westward as far as the degrees of twenty-nine inclusive of northern latitude, and so west in a direct line as far as the south seas, together with all and singular the ports, harbors, bays, rivers and inlets belonging in the province and territory aforesaid, and also all the soils, lands, fields, woods, mountains, farms, lakes, rivers, bays, islets situate or being within the bounds limits last before mentioned, etc."

2 Cobb & Haywood's Compilation, p. 1.

The western boundary of the territory granted was then unknown, but extended to the western boundary of the possessions of Great Britain in North America at that period. This boundary was, by the treaty between Great Britain, France, and Spain, made in February, 1763, fixed irrevocably upon a line drawn along the "middle of the Mississippi river." 3 Jenkinson's Treaties, 177; *Iowa v. Illinois*, 147 U. S., 2, 13 Sup. Ct., 239, 37 L. Ed., 55; *Louisiana v. Mississippi*, 202 U. S., 41, 26 Sup. Ct., 408, 50 L. Ed., 913. This line

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was afterwards recognized as the western boundary of the original thirteen States, or those whose territory extended to the Mississippi river, in the treaty made by them with England September 3, 1783. 8 Stat., 81, 82.

Virginia and North Carolina then owned all the territory bordering upon the east bank of the Mississippi river from near its source to the southern boundary of Tennessee, now composing the States of Illinois, Kentucky, and Tennessee, and afterwards ceded it to the United States for the purpose of forming new States to be admitted to the Union. North Carolina ceded her part of the territory in December, 1789, and authorized her senators in the congress of the United States to convey it, which they did February 25, 1790, and the conveyance was accepted by an act of congress passed for that purpose April 2, 1790. 1 Stat., 106, c. 6. The territory ceded and conveyed is described in the cession act and conveyance as follows:

"All right, title and claim which this State [North Carolina] has to the sovereignty and territory of the lands situated within the chartered limits of this State, west of a line beginning on the extreme height of the Stone Mountain, at the place where the Virginia line intersects it, running thence along the extreme height of said mountain to the place where the Watauga river breaks through it; thence a direct course to the top of the Yellow Mountain, where Bright's Road crosses the same; thence along the ridge of said moun-

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tain, between the waters of Doe river and the waters of Rock creek, to the place where the road crosses the Iron Mountain; from thence along the extreme height of said mountain to where the Nolichucky river runs through the same; thence to the top of the Bald Mountain; thence along the extreme height of said mountain to Painted Rock, on the French Broad river; thence along the highest ridge of said mountain to the place where it is called the Great Iron or Smoky Mountain; thence along the extreme height of said mountain to the place where it is called Unicoi or Unaka Mountain, between the Indian towns of Cowee and Old Chota; thence along the main ridge of said mountain to the southern boundary of this State." Cobb & Haywood's Compilation, 7, 8, 9, 10.

The inhabitants of this Territory, through their representatives, organized as a State and adopted a constitution February 6, 1796, which described the territorial boundaries of the new State of Tennessee in the language of the cession act; and this State, with this constitution, was by congress admitted into the union as a sovereign State June 1, 1796. 1 Stat., 491, c. 47. The act of congress does not define the limits of the State, further than to declare that it shall have and be composed of all the territory ceded by North Carolina and they are therefore controlled by the cession act and the constitution of the State. They are repeated in substantially the same language as in

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those instruments in the constitutions adopted in 1834 and 1870. The description given in the latter is in these words:

“That the limits and boundaries of this State being ascertained, it is declared that they are as hereinafter mentioned, that is to say, beginning on the extreme height of Stone Mountain at the place where the line of Virginia intersects it, in latitude thirty-six degrees thirty minutes north, running then with the extreme height of said mountain [and then with other mountains therein stated and named] to the southern boundary of this State as described in the act of cession of North Carolina to the United States of America; and that all territory, land and waters, lying west of said line as before mentioned and contained within the chartered limits of North Carolina are within the limits and boundaries of this State, over which the people have the right of exercising sovereignty and the right of sale, so far as it is consistent with the constitution of the United States, the bill of rights, constitution of North Carolina, the cession act of said State and the ordinances of congress for the government of the territory northwest of the Ohio.” Const. Tenn., art. 1, sec. 31.

The general description of the boundaries of the State, preceding a specific description contained in the Code adopted in 1858 is in the language of the constitution. Code, sec. 60. In the same chapter (section

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69) the boundary between this State and the State of Arkansas is described as follows:

| "The western boundary of the State of Tennessee is in the middle of the stream of the Mississippi river including within the State of Tennessee all such islands as are held under grants from the States of Tennessee and North Carolina."

This section must be construed to mean the same as the cession act and provision of the constitution; otherwise it is invalid. Congress first authorized the State of Tennessee as its agent to dispose of all unappropriated and ungranted lands within its territory for certain purposes, and afterwards in 1846 released and surrendered to it all right and title of the United States to the lands within the State acquired by them from North Carolina then ungranted and unappropriated.

The State of Arkansas as well as those of Missouri and Iowa were part of the territory of Louisiana owned at various times by France and Spain, and finally acquired by the United States from the former by purchase in 1803. Arkansas was admitted into the union as a sovereign State by an act of congress approved June 15, 1836 (5 Stat., 50, c. 100), and its eastern boundary was designated and defined as the "middle of the main channel" of the Mississippi river. This boundary is also embodied in the several constitutions of that State subsequently adopted. There is no difference between the "middle of the Mississippi river," as the western boundary line of Tennessee is described,

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and the "middle of the main channel" of that river, as the eastern boundary line of Arkansas is defined. They mean the same thing, and the words "main channel" were evidently intended to make the common boundary more definite by designating the larger channel, where there existed two or more channels on account of the numerous islands to be found in the river. The use of the words "middle of the main channel" could not have been intended to designate a different boundary line than that of Tennessee as it then existed, because congress had no power to change the boundaries of Tennessee as fixed by it when that State was admitted to the union in 1796. Const. U. S., art. 4, sec. 3; *Louisiana v. Mississippi*, 202 U. S., 40, 26 Sup. Ct., 408, 50 L. Ed., 913.

While complainant and the defendants agree that the western boundary line of Tennessee is as declared and fixed by the treaties and legislative enactments which we have briefly stated—that is, that the middle of the Mississippi river as it ran in 1763 is the line that separates the jurisdiction of Tennessee from that of Arkansas—yet they disagree as to what was meant by the expression "middle of the river" and how it is now to be interpreted. Complainant insists that the contracting parties and legislative bodies, establishing this boundary by these words, "middle of the river," meant the middle of the main channel of the river, or a line along the river bed equidistant from the visible, defined, and substantially established banks confining

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the waters on either side—that is, the line between it and Arkansas; while the defendants contend that they meant the center of that part of the waters or stream of the river which is deepest and is usually used by steamboats and other craft plying the river, or, in other words, the center of the channel of commerce. This is an important question, affecting the States of Tennessee and Arkansas in their sovereign capacity, and their jurisdiction along this entire joint boundary line, and the decision of this case, since at the point where the water flowed over the lands in controversy the deep-water channel used by boats in ascending and descending the river previous to 1876 ran much nearer to one bank than the other, the Tennessee bank, and it is entitled to the most careful consideration by the court. The defendants insist that under the laws of nations and the weight of decisions of the courts of this country, where a navigable river or the middle of such river is made the boundary line separating coterminous States or nations, the center of the channel of commerce is the true and correct line between them, and that this rule should apply in this case. The State controverts this, and maintains that the weight of authority in such cases is that the separating line is midway the channel or bed of the river and equidistant from the visible and established banks within which the waters are confined and flow. The State further insists that not only the general rule is in favor of this contention, but that, if it were otherwise, it would not

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be applicable to this case, because the line has been fixed as claimed by it by treaties, legislation, and long usage, acquiescence, and possession by the two sovereign States interested, complainant and Arkansas. Before proceeding to the direct question involved, we think it will throw some light on the authorities we will discuss to notice what are the constituent parts of rivers or other streams as defined and used by the courts. In *Lux v. Haggin*, 69 Cal., 417, 10 Pac., 770, it is said:

“A watercourse is defined to consist of bed, banks, and water. It must be made to appear that the water usually flows through a regular channel with banks or sides. The bed and banks, or the channel, is in all cases a natural object to be sought after, not simply by application of any abstract rule, but, like other natural objects, to be sought for and found by the distinctive appearance it represents. Whether, however, worn deep by action of the water or following the exact depression without any marked erosion of soil or rock; whether distinguished by difference of vegetation or otherwise rendered perceptible—a channel is necessary to the constitution of a watercourse.”

In *Benjamin v. River Improvement Company*, 42 Mich., 628, 4 N. W., 483, it is said that the channel of a river is the passageway between the banks through which its waters flow; and in *Larrabee v. Cloverdale*, 131 Cal., 96, 63 Pac., 143, a channel is said to include, not only all the channels through which under existing conditions of the country the water naturally flows,

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but new channels through which it may afterwards flow.

We think, from examination of a number of cases bearing more or less upon this subject, that the channel of the river and the bed of the river ordinarily mean the same thing, and are understood to describe that depression on the earth's surface in which the waters of the stream are confined and flow in its ordinary stages, unaffected by freshets or droughts. *Houghton v. Railroad Co.*, 47 Iowa, 370; *Cessill v. State*, 40 Ark., 504; *Railroad v. Ramsey*, 53 Ark., 314, 13 S. W., 931, 8 L. R. A., 559, 22 Am. St. Rep., 195; *Stover v. Jack*, 60 Pa., 339, 100 Am. Dec., 566; *Howard v. Ingersoll*, 13 How. (U. S.), 381, 14 L. Ed., 189; *Alabama v. Georgia*, 23 How. (U. S.), 505, 16 L. Ed., 556; *Branham v. Turnpike Co.*, 1 Lea (Tenn.), 704, 27 Am. Rep., 789; *Dunleith & Dubuque Bridge Co. v. Dubuque*, 55 Iowa, 558, 8 N. W., 443.

The precise question we are now considering was before the supreme court of Arkansas in 1883, and that court construed the treaties we have referred to, and the act of congress admitting Arkansas into the union, as contended for by Tennessee, and held the line between that State and Tennessee to be the middle of the main channel or bed of the Mississippi river, equidistant from the visible banks confining its waters, and not one along the so-called center of the channel of commerce. The opinion is an able and interesting one, and since it is a decision of the direct question here involved by

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the highest court of one of the two sovereign States interested, in a case to which that State was a party, we quote from it at length. Cessill, the plaintiff in error, was indicted and convicted of illegally selling liquor from a boat anchored in the Mississippi river, and appealed. Eakin, J., speaking for the court, said:

"It will be observed that the principle upon which the court proceeded is that the line of deepest water in the river bed is the boundary of the State, and continues such as it fluctuates.

"The act of congress admitting the State into the union, approved June 15, 1836 (5 Stat., 50, c. 100), designated for the eastern boundary 'the middle of the main channel' of the Mississippi river, between latitude thirty-six degrees north and the northeast corner of the State of Louisiana, at a point to be determined by extending the north line of the latter State to the middle of the said channel. This description was embodied in the constitution of 1836, and repeated in that of 1864. It was also adopted in the constitution of 1868, with the explanation that the said boundary should include a certain island known as 'Belle Point Island.' In addition to this, the present constitution provides generally that the State shall embrace 'all other land originally surveyed and included as a part of the territory of the State of Arkansas.' No question arises in this case upon either of the two qualifications, and the sole matter left for us to decide is this: What is meant by the 'main channel,' and what is the middle of it?

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"The channel of a river, bay, or sound is, in boatmen's parlance, the course over its bed over which the water is deepest and the navigation safest. This may be irrespective of the current or distance from the shore. In questions of geography or boundaries, however, it is more generally used to designate the depression of a bed below the permanent banks, forming a conduit along which waters flow, and which may be at some times full and at others nearly, if not quite, dry. In this sense it is of common use in law. It is the more obvious signification in connection with boundaries, inasmuch as it presents something of a permanent nature, or at least at all times visible, and, when changed, leaving traces of the old landmarks. In this sense we speak of bayous—Bartholomew and Atchafalaya—as old channels of the Arkansas and Red rivers. They have permanent features independent of water; whereas, channels in the sense of the river pilot are ever shifting, invisible, discoverable only by patient soundings, and then imperfectly. We cannot suppose that such channels would be adopted as State boundaries, or as references to determine them.

"The Mississippi river is full of islands, having water beds on each side. The object of the description of the boundary was to afford the means of determining whether or not any given island was within the State, by taking the largest of these water conduits as the true river. The middle of the main channel, then, must mean the point or line long the river bed equidistant

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from the permanent and defined banks of the ascertained channel on either side. Even this line is a fluctuating one, but in a far less and no very inconvenient degree. Gradual attrition on one side, with accretion on the other, making a change in the permanent banks, might perhaps change the boundary with regard to absolute space. But it is not necessary, for practical purposes, that a boundary should be a fixed mathematical line, and this could only apply to changes in the banks of a channel which remains substantially the same. For, if the main body of the water were to find a new channel and abandon the old one, leaving intervening lands in a natural state, the old boundary would be still ascertainable, and would govern. This has been decided in the case between Kentucky and Missouri (*infra*), and results, with regard to surveyed lands, from the additional clause, above noted, in the constitution of 1874. It seems that the largest channel determines which is the river, and the central line of that makes the State boundary.

“The boundary line in question is a very old one, and does not concern this State alone. It originated with the treaty between England, France, and Spain, in February, 1763, which made the middle of the Mississippi river the boundary between British and French territories. This line has been ever since observed in subsequent treaties, in federal legislation, in State constitutions, and in judicial decisions, and there are not lacking unmistakable indications of the meaning

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of the middle of the river. For instance, in the treaty between the United States and Spain, in October, 1795, before our purchase of Louisiana, the fourth article provides 'that the western boundary of the United States, which separates them from the Spanish colony of Louisiana, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of said States to the completion of the thirty-first degree of latitude north of the equator.'

"In the case of *Myers v. Perry et al.*, 1 La. Ann., 372, which resulted from a steamboat collision on the Mississippi, it became necessary to ascertain the *locus in quo* as affecting jurisdiction between the States of Louisiana and Mississippi. The middle of the river was taken as the boundary line, without any reference to depth of the water. See, also, on the same subject, a case very replete with historical learning, that of *Morgan & Harrison v. Reading*, reported in 3 Smedes & M. (Miss.), 366, in which this great empire boundary is described, with reference to the treaty of 1763, as 'a line drawn along the middle of the Mississippi.' This would not be a good description of a steamboat track, zigzagging from bank to bank amongst sand bars in low water. . . .

"In the case of *Missouri v. Kentucky*, 11 Wall. (U. S.), 395, 20 L. Ed., 116, which was a contest between States for jurisdiction over Wolf Island, in the Mississippi, Mr. Justice Davis said that by virtue of the treaties above named, together with the treaty of peace

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with England in 1783, the ancient right of Virginia, to which Kentucky had succeeded, extended to the middle of the bed of the Mississippi river.

"It seems that, where there are several channels, the principal one is considered the river, and in this the *medium filum* makes the boundary.

"There was only one channel in this case, which was the river bed between the Arkansas and Tennessee shores at Osceola. The court and attorneys treated the case throughout as if channel meant the line of the deepest water sought by boatmen, and the instructions were given on one side and refused on the other with reference to this idea. The river bed being the same as in 1784, no question could arise as to change of channel. The instructions asked by the defense were erroneous, but those given for the State were equally so, being based on a false theory as to the meaning of channel. It should have been left to the jury to determine whether the position of the boat was nearer to the Arkansas or the Tennessee main bank, and to have found the defendants guilty or innocent accordingly." *Cessill v. State*, 40 Ark. 501.

We concur fully with the supreme court of Arkansas in the construction given the treaties of 1763 and 1783 in that opinion, and hold, as held by that court, that the boundary line between the British possessions in America, which then included all the territory now composing the States bordering upon and having for their western boundary the Mississippi river, and the territory of

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Louisiana then belonging to Spain, was fixed and defined as a line along the middle of the main channel of the river, equidistant from the visible and permanent banks confining its waters, and that the several acts of congress admitting into the union the States lying upon both sides of the river at various times, in calling for the middle of the river and the middle of the main channel or stream of the river, had reference to these treaties and must be construed to mean the same thing. This question has not before been before this court; but in a case involving property rights upon an unnavigable stream, called for as a boundary line of private estates, it was held that "the thread of the stream is the middle line between the shores, irrespective of the depth of the channel, taking them in the natural and ordinary stage of the water, at medium height, neither swollen by freshets nor shrunk by droughts." *Branham v. Turnpike Co.*, 1 Lea (Tenn.), 706, 27 Am. Rep., 789. The general understanding of the people and the constituted authorities of Tennessee has been and is that the line separating the State from Arkansas is as defined in the case of *Cessill v. State*, supra. This appears from an act of the general assembly of the State approved April 15, 1903 (chapter 420, p. 1215, Acts 1903), in which the lands in controversy and all others lying upon the Tennessee side of the middle of the old bed of the river are declared to be the property of the State, and the governor authorized to appoint commissioners, to act with other commissioners to be appointed by the State of Arkau-

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sas, to run and mark the line, and also to report to the governor the extent and value of such lands. The general assembly of Arkansas passed a similar act, but it was vetoed by the governor of that State, and therefore no commissioners were appointed under the act passed by the legislature of Tennessee. This suit was brought by direction of the governor of this State, and is not only an acquiescence in the boundary line as defined by the authorities of Arkansas, but an assertion of jurisdiction up to that line and title to property within it. We think, whatever may be the construction of the treaties defining this great boundary line, or the acts of congress admitting other States bordering upon it, that the concurrence of Tennessee and Arkansas in the interpretation of the treaties and legislation affecting their boundary line is effective between them, and controlling in this and other cases involving the question.

These same treaties, we have seen, which define the common boundary line of all the States bordering upon both sides of the Mississippi river, in connection with the acts of congress admitting those States into the union, have been frequently construed by other courts, and in every case that has been called to our attention, with two exceptions, all these courts have concurred with the conclusions reached in the case of *Cessill v. State*, supra.

The boundary line separating the States of Louisiana and Mississippi, Missouri and Kentucky, Missouri and Illinois, and Iowa and Illinois, where the Mississippi flows between them, is defined in the several acts of con-

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gress admitting these States into the union in words similar to those defining the line between Tennessee and Arkansas; that is, "the middle of the Mississippi river," or "the middle of the main channel of the river." We have seen, from cases cited in the opinion of the court in *Cessill v. State*, supra, of *Myers v. Perry*, 1 La. Ann., 372, and of *Morgan & Harris v. Reading*, 3 Smedes & M., 366, that the supreme courts of Louisiana and Mississippi have both construed the treaty of 1763, and the acts of congress in relation to it, to define and fix the line equidistant from the banks of the river. The supreme court of Iowa has so held in a case involving the line between it and the State of Illinois. In relation to what is meant by the middle of the channel it is there said:

"The course of navigation, which follows what boatmen call the channel, is extremely sinuous and often changing, and is unknown except to experienced navigators. On the other hand, the bed of the main river, designated by the word 'channel' used in its primary sense, is the great body of water flowing down the stream. It is broad and well defined by islands or the main shore. It cannot be possible that congress and the people of the State in describing its boundary used the word 'channel' to describe the sinuous, obscure, and changing line of navigation rather than the broad and distinctly defined bed of the main river. The center of this river bed channel may be readily determined, while the center of the navigable channel often could not be known with

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certainty. The first is a fit boundary line of a State. The second cannot be." *Dunleith & Dubuque Bridge Co. v. Dubuque County*, 55 Iowa, 558, 8 N. W., 443.

The case of *Missouri v. Kentucky*, 11 Wall. (U. S.), 395, 20 L. Ed., 116, involved a question of the jurisdiction over Wolf Island in the Mississippi river. Construing the treaty of 1763 between England, France, and Spain, Mr. Justice Davis, speaking for the court, said:

"It is unnecessary for the purposes of this suit to consider whether on general principles the middle of the channel of the navigable river which divides coterminous States is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain, and England in February, 1763, stipulated that the middle of the Mississippi river should be the boundary between the British and French territories on the continent of North America. And this line, established by the only sovereign powers at that time interested in the subject, has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain in 1783, and by different treaties since then, the last of which resulted in the acquisition of the Territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836. And Kentucky succeeded in 1792 to the ancient

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right and possession of Virginia, which extended by virtues of these treaties to the middle of the bed of the Mississippi river."

The act of congress passed April 18, 1818 (3 Stat., 429, c. 67), enabling the people of the Territory of Illinois to adopt a constitution and organize a State, defined the western boundary of the State as follows: "Starting in the middle of Lake Michigan, at north latitude forty-two degrees, thirty minutes, thence west to the middle of the Mississippi river, and thence down the Mississippi river to its confluence with the Ohio river."

The case of *St. Louis v. Rutz*, 138 U. S., 226, 11 Sup. Ct., 337, 34 L. Ed., 941, was brought to recover an island in the Mississippi river, and involved the location of the line separating the States of Missouri and Illinois. The island was found to be upon the eastern side of the center of the main channel and bed of the river, and the decree was for the defendant. It is there said:

"As the law of Illinois confers upon the owner of land in that State which is bounded by or fronts on the Mississippi river the title in fee to the bed of the river, to the middle thereof, or so far as the boundary of the State extends, such riparian owner is entitled to all the lands in the river which are formed on the bed of the river or of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, in the State of Missouri, to extend his ownership by mere accretion to land situated in the State of Illinois, the title in fee

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to which is vested by the law of Illinois in the riparian owner of the land in that State."

In the cases of *Jones v. Soulard*, 24 How. (U. S.), 41, 16 L. Ed., 604, and *St. Louis Public School v. Risley*, 10 Wall. (U. S.), 91, 19 L. Ed., 850, it is held that, under the act of Congress admitting Missouri to the union and defining its eastern boundary as the middle of the main channel of the Mississippi river, the line was the middle of the river, without any reference whatever to where the channel of commerce ran, and presumably to a line midway between the established banks of the river.

In the cases of *Nebraska v. Iowa*, 143 U. S., 359, 367, 12 Sup. Ct., 396, 36 L. Ed., 186, and *Missouri v. Nebraska*, 196 U. S., 23, 25 Sup. Ct., 155, 49 L. Ed., 372, both of which involved controversies of jurisdiction growing out of sudden and violent changes made by the Missouri river in its channel similar to the one made by the Mississippi in this case, it was held that the boundary line between the commonwealths, which were parties to those cases, respectively, remained fixed in the center of the old river bed, thus in effect holding that previous to the avulsions by which the channel of the river was changed the State line was the middle of the channel; that is, a line midway between the banks of the river. In the case of *Nebraska v. Iowa*, 143 U. S., 361, 12 Sup. Ct., 396, 36 L. Ed., 186, the following quotation is made, with approval, from the opinion of Attorney-General Cushing in a matter of dispute between the United States and Mexico as to the international boundary at the place

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where the Rio Grande had made a change in its channel:

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation through whose territories the river thus breaks its way suffers injury by loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel and within given banks, which are the real international boundary."

The only cases that have been called to our attention supporting the contention of the defendants are those of *Buttenueth v. St. Louis Bridge Co.*, 123 Ill., 535, 17 N. E., 439, 5 Am. St. Rep., 545, and *Iowa v. Illinois*, 147 U. S., 1, 13 Sup. Ct., 239, 37 L. Ed., 55, both involving the line in the Mississippi river separating the States of Iowa and Illinois. The former was decided first, and is cited and approved in the latter. Mr. Justice Field, delivering the opinion of the court, says:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of

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the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is therefore laid down in all well-recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State on its side will exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, 'a line drawn along the middle of the River Mississippi from its source to the River Iberville,' as there used, is meant along the middle of the channel of the River Mississippi. Thus Wheaton, in his *Elements of International Law* (8th Ed.), section 192, says: 'Where a navigable river forms the boundary of coterminous States, the middle of the channel, or "thalweg," is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long, undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river.'

"And in section 202, while thus stating the rule as to the boundary line of the Mississippi river being the mid-

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dle of the channel, he states that the channel is remarkably winding, 'crossing and recrossing perpetually from one side to the other of the general bed of the river.'

"Mr. Creasy, in his First Platform on International Law, p. 222, section 231, expresses the same doctrine. He says:

"It has been stated that, where a navigable river separates neighboring States, the "thalweg," or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the river, the "*medium filum aquae*" was regarded as the boundary line, and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*. Where this is the case, the middle of the channel of traffic is now considered to be the line of demarcation.' "

And after citing several other works on International Law, Justice Field proceeds:

"The reason and necessity of the rule of international law as to the midchannel being the true boundary line of a navigable river separating independent States may not be cogent in this country, where neighboring States are under the same general government, as in Europe, yet the same rule will be held to obtain, unless changed by statute or usage of so great length of time as to have acquired the force of law.

"As we have stated, in international law and by the

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usage of European nations, the terms 'middle of the stream' and 'midchannel' of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818 (3 Stat., 428, c. 67), under which Illinois adopted a constitution and became a State and was admitted into the union, made the middle of the Mississippi river the western boundary of the State. The enabling act of March 6, 1820 (3 Stat., 545, c. 22, section 2), under which Missouri became a State and was admitted into the union, made the middle of the main channel of the Mississippi river the eastern boundary, so far as its boundary was coterminous with the western boundary of Illinois. The enabling act of August 6, 1846 (9 Stat., 56, c. 89), under which Wisconsin adopted a constitution and became a State and was admitted into the union, gives the western boundary of that State, after reaching the River St. Croix, as follows: 'Thence down the main channel of said river to the Mississippi, thence down the center of the main channel of that [Mississippi] river to the northwest corner of the State of Illinois.' The northwest corner of the State of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, 'middle of the Mississippi river,' and 'middle of the main channel of the Mississippi river,' and 'center of the main channel of that river,' as thus used, are synonymous. It is not at all likely that the congress of the United States intended that those terms, as applied to the Mississippi

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river separating Illinois from Iowa, should have a different meaning when applied to the Mississippi river separating Illinois from Missouri, or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing."

He then quotes extensively from the case of *Dunleith & Dubuque Bridge Co. v. County of Dubuque*, supra, and *Buttenth v. St. Louis Bridge Co.*, supra, and concludes:

"The opinions in both these cases are able, and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of the opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between States of the union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream; that is, to the 'midchannel,' and, if there be several channels, to the middle of the principal one, or rather, the one usually followed."

This case is in direct conflict with the previous cases of *Missouri v. Kentucky*, *St. Louis v. Rutz*, *Jones v. Soulard*, *St. Louis Public School v. Risley*, and *Nebraska v. Iowa*, above cited, which involved practically the same

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question, and the first four construed the same treaties and acts of congress. They are not differentiated, overruled, or even referred to in the case of *Iowa v. Illinois*. The decision in these cases is based upon the proper construction of the treaties and acts of congress admitting the States into the union, and not upon the laws of nations. We are better satisfied with the reasoning of these cases than we are with that of the last one, and prefer to follow them. We think they correctly construe and interpret the treaties and legislation controlling and defining the boundary lines of the coterminous States upon the Mississippi river according to the intention of the powers making the treaties and of congress in admitting those States into the union.

The case of *Iowa v. Illinois* was decided avowedly upon the rules of international law, and was not a construction of the treaties defining the boundaries under consideration, with a view of ascertaining the intention of the parties making them, and the controlling consideration with the court in the application of the rules of international law to the case was the preservation of equality in the right of navigation to the river to the co-terminous States.

There is much conflict in the opinions of text-writers upon the law of nations upon this question; but the weight of authority is that at the time the treaties in question were made, in the absence of a convention establishing it otherwise, the true boundary between nations bordering upon navigable waters was a line midway be-

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tween the visible and fixed banks of the stream. Mr. Creasy, in his work on International Law, the chief authority cited by the court in *Iowa v. Illinois*, says that "formerly the line drawn along the middle of the water, the *medium filum aquae*, was regarded as the boundary line, and still will be regarded *prima facie* as the boundary line except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*."

It will not be amiss here to call attention to what Mr. Angell, in his work on Water Courses, says upon this question:

"By the middle of the channel is meant the thread of the stream, the *filum aquae*; that is, the middle line between the shores upon each side, without regard to the channel, or lowest parts or deepest parts of the water. In ascertaining the shores, the water line on each side to measure, it will be proper to find where these lines are when the water is in its natural and ordinary stage, at medium height, neither swollen by freshets nor shrunk by droughts."

Another author says:

"A river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks and running in such and such channel; hence there is water having a bank and a bed over which the waters flow in its channel, meaning by the word 'channel' the place where the river flows, includ-

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ing the whole breadth of the river." Grotius, p. 18, c. 2.

We think some confusion has arisen, both in the textbooks and in the decisions, in relation to this matter, by failure to properly differentiate those cases where there are several channels caused by the existence of islands in the stream, where it is held that the line is the center of the main channel, meaning the largest division of the river at that place, from those where there is only one channel to be followed.

We do not deem it necessary, however, to enter into a discussion of the laws of nations upon the subject.

Whatever may be the general rule, we do not think it applies or is controlling in this case. General rules of international law cannot be invoked when the matter in question has been settled by the parties in interest otherwise, either by agreement, convention, acquiescence, or long and undisturbed occupancy and possession. Twiss, *International Law*, 127; 1 Halleck, *International Law*, 50.

We do not think the high contracting parties to the treaty between Great Britain, France, and Spain, made in 1763, in which the line separating the British possessions in North America and the Territory of Louisiana, defined to be the "middle of the river," meant a channel of commerce as it varied and shifted from side to side of the stream, but a line midway between the banks. We understand from Mr. Creasy, as above quoted, that at that day the call for a navigable stream

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as the boundary line between two nations was construed to be the middle of the bed of the river, a line equidistant from the respective banks, and will be regarded *prima facie* so at this day. When these treaties were made the country along the banks of the Mississippi river above the city of New Orleans was practically unknown and uninhabited, save by the Indians. The river was not navigated. There were no boats upon the river, and its various windings had not been surveyed or mapped, nor its depth sounded. There was no known fixed channel of commerce in the river. Had a question of jurisdiction arisen under the construction of the treaty given in *Iowa v. Illinois*, it would have been impossible to determine whether the occurrence took place within the territories of Great Britain or those of France or Spain. We think, considering the then existing conditions, every presumption is that the parties intended the middle of the channel between the banks which control the waters of the stream, the bed of the river, should be the line separating their respective Territories. The banks were visible, and a line midway between them could be ascertained when occasion required it. No channel of commerce existed, and a line in the center of it could not possibly be located. The first constructions of these ancient treaties were in accordance with the contention made by Tennessee in this case. In the treaty made by the United States with Spain in October, 1795, before the purchase of Louisiana, the fourth article provided "that the western boundary of the United States,

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which separates them from the Spanish colony of Louisiana, is in the middle of the channel or bed of the River Mississippi, from the northern boundary of said States to the completion of the thirty-first degree of latitude north of the equator." *Cessill v. State*, 40 Ark., 505. This was not only an interpretation of the former treaties, but it superseded them. The decisions of all the courts of last resort of the several States, as well as those of the United States, involving this boundary line, with the exception of those of *Buttenuth v. St. Louis Bridge Co.*, supra, and *Iowa v. Illinois*, supra, have been favorable to the contention that the line runs midway between the banks of the river, and it is only at a late day by those cases that a doubt was suggested or arose as to the true and correct line which formerly separated the British possessions in America from those of France and Spain, and subsequently a number of the largest and most influential States of the union. The former construction has become a rule of property and should not be disturbed. We are not impressed with the argument that it is necessary to hold the line to be along the so-called channel of commerce in order to preserve to the several States interested in the question equality in the right of navigation of the river. We do not think such necessity exists. Where a navigable river constitutes the boundary between two States, the middle of the channel separating their respective jurisdictions, both are presumed to have free use of the whole of it for the purposes of commerce. The whole river is of

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right common to both nations as a public highway. *The Apollon*, 9 Wheat. (U. S.), 362, 371, 6 L. Ed., 111; *Handly v. Anthony*, 5 Wheat. (U. S.), 374, 5 L. Ed., 113; Wharton, Int. Law Digest, section 30; Gould on Waters, 202; Wheaton, Int. Law, sections 192, 193. The free navigation of the Mississippi river by citizens of the United States was expressly provided for and preserved in the treaty made by the United States with Great Britain in 1783, and again in that made by the United States with Spain, October 27, 1795. The right of the citizens of the several States of the union to navigate the waters of this river has been frequently declared by acts of congress. It is asserted in the constitutions of all the states bordering upon its waters, and is so well established that no possible apprehension can be entertained that it will be interfered with. Act Cong. May 18, 1796, 1 Stat., 464, c. 29; Act Cong. June 1, 1796, 1 Stat., 490, c. 46; Act Cong. March 3, 1803, 2 Stat., 229, c. 27; Act Cong. March 26, 1804, 2 Stat., 277, c. 35; Act Cong. Feb. 20, 1811, 2 Stat., 641, c. 21; Act Cong. March 3, 1811, 2 Stat., 662, c. 46; Act Cong. April 8, 1812, 2 Stat., 701, c. 50; Act Cong. June 4, 1812, 2 Stat., 743, c. 95; Act Cong. March 1, 1817, 3 Stat., 348, c. 23; Act Cong. May 8, 1817; Gould on Waters, section 68; Const. Tenn., 1870, art. 1, section 29.

The commerce clause of the constitution of the United States, all other things aside, affords ample protection to the right of every citizen to the free navigation of the river, whether the current be in one State or another,

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without fear of hindrance or burdens imposed by such States. There can be no doubt of this.

The reasons for having a fixed, certain, and visible line, such as the middle of the channel as measured from the respective banks of the river, we think, greatly outweigh those advanced in support of the decision of the case of *Iowa v. Illinois*. It is of the highest importance to the adjoining States that the location of the boundary line between them be certain and susceptible of easy proof; otherwise, they will be greatly embarrassed in the enforcement of their criminal laws, the assessment and collection of taxes, and many other things in the ordinary and common exercise of sovereignty. It is easy to conceive cases where so much doubt could be thrown upon the location of the channel of commerce that the jurisdiction of either State to punish crime committed upon the river would be entirely defeated.

But the question has been settled by the duly constituted authorities of Tennessee and Arkansas by judicial decisions, legislation, and other authorized official actions, long acquiescence, the exercise of jurisdiction unchallenged, and other acts amounting to an agreement or convention. The highest court of Arkansas, in a case to which the State was a party, and at its instance, in the assertion of its sovereignty and jurisdiction, has defined the limit between the two States to be the line midway between the visible banks of the river, and enforced the criminal laws of the State up to that line. The general assembly of Tennessee has claimed title to the lands

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formerly covered by the waters of the river up to the same line, and the governor of the State has directed and authorized that the proper officers institute this suit to recover such lands. Both States agree upon it as the true and correct line separating their territories, and others cannot be heard to complain. Such a course of conduct has been held to be conclusive upon States in controversies concerning their boundaries. *Indiana v. Kentucky*, 136 U. S., 479, 10 Sup. Ct., 1051, 34 L. Ed., 329. Tennessee is now before this court as a suitor, asserting that her western boundary line lies midway between the visible banks of the Mississippi river. Arkansas, as a suitor in the case of *Cessill v. State*, supra, asserted that her eastern boundary line ran at the same place, and exercised jurisdiction to such line. This is binding upon both States, and neither can now recede from such solemn admissions of the location of the line separating them.

Tennessee acquired title to all the soil under the waters of the Mississippi river to the limits of her jurisdiction. It is well-settled law that soil under the waters of navigable rivers, as well as the waters, are held by the States for the use and in trust of the public, so long as the river continues navigable.

The United States has always recognized this rule in its disposition of the public domain. The grants made by it lying upon navigable streams to private parties are limited by high-water mark, and the soil between that and the rivers and under their waters vested

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in the States in which it lies. The States, however, may dispose of this property as they may allow, subject to the general control of congress over all navigable waters; this being a matter within their discretion and governed by the State authorities.

In *Hardin v. Jordan*, 140 U. S. 371, 372, 11 Sup. Ct., 808, 838, 35 L. Ed., 428, the title of the State to the soil under navigable waters within their boundaries, and their right to control and dispose of the same, before and after abandoned by the waters, is held and stated in these words:

“With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of the lands so granted inures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto and held in trust for public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. *Pollard v. Hagan*, 3 How. (U. S.), 212, 11 L. Ed., 565; *Goodtitle v. Kibbe*, 9 How. (U. S.), 471, 13 L. Ed., 220; *Weber v. Harbor Commissioners*, 18 Wall. (U. S.), 57, 21 L. Ed., 798. Such title being in the State, the lands are subject to State regulation and control, under the conditions,

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however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, State control and ownership therein being supreme, subject only to paramount authority of congress in making regulations of commerce and in subjecting the lands to the necessities and uses of commerce. See *Manchester v. Massachusetts*, 139 U. S., 240, 11 Sup. Ct., 559, 35 L. Ed., 159; *Smith v. Maryland*, 18 How. (U. S.), 71, 15 L. Ed., 269; *McCready v. Virginia*, 94 U. S., 391, 24 L. Ed., 248; *Martin v. Waddell*, 16 Pet. (U. S.), 367, 10 L. Ed., 997; *Den v. Jersey Co.*, 15 How. (U. S.), 426, 14 L. Ed., 757.

“The right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas, and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters

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and to what extent this prerogative of the State over the lands under water shall be exercised."

In Tennessee it has uniformly been held that grants to lands lying upon navigable streams extend to ordinary low-water mark only, and that the title to the bed of the stream remains in the State. *Martin v. Nance*, 3 Head, 649; *Posey v. James*, 7 Lea, 98; *Goodwin v. Thompson*, 15 Lea, 209, 54 Am. Rep., 410; *Holbert v. Edens*, 5 Lea, 204, 40 Am. Rep., 26; *Stockley v. Cissna*, 119 Fed., 829, 56 C. C. A., 324; *Taylor v. Commonwealth*, 102 Va., 759, 47 S. E., 875, 102 Am. St. Rep., 865; *Holman v. Hodges*, 112 Iowa, 714, 84 N. W., 950, 58 L. R. A., 673, 84 Am. St. Rep., 367.

In the case of *Holbert v. Edens*, supra, it is said:

"If a watercourse be navigable in a legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public."

In the case of *Goodwin v. Thompson*, 15 Lea, 215, 54 Am. Rep., 410, this court held, not only that the soil in navigable streams belonged to the State, but that it was not subject to entry or grant as other lands; the statute providing for disposition of public lands not authorizing such grants. In that case it is said:

"We think the public use of our navigable rivers imperatively requires that the soil under the water should be in the State in trust for the public, and that title to the soil under such terms was not intended to be secured by individuals under our general land laws, and

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that any person setting up claim thereto must be able to show an express legislative grant."

It is also well-established law that when the waters recede, or land is formed upon the bed of navigable rivers, as in case of islands forming in navigable waters, the property in such dry land is in the State, to be disposed of by it as its authorities may determine and direct. *Morris v. Brooke* (Del.), cited in *Mulry v. Norton*, 53 Am. Rep., 215, note; *Hardin v. Jordan*, 140 U. S., 371, 372, 11 Sup. Ct., 808, 838, 35 L. Ed., 428; *Packer v. Bird*, 137 U. S., 666-672, 11 Sup. Ct., 210, 34 L. Ed., 819; 2 Black. Com., 261; 11 Am. & Eng. Enc. Law (1st Ed.), 865.

The case of *Morris v. Brooke* is an instructive one, and the conclusions of the court are well supported by authority. We quote from it:

"New islands arising in the sea or in a navigable river *prima facie* belong, according to the common law, to the king in England, and in this country to the State. But this rule is not universal.

"The right to the new islands, and also to lands gained by alluvion or dereliction (in cases where they are not gained by insensible degrees), all of which are governed by the same principles, follows the right to the soil which is covered with water. As the king is the proprietor in general of the soil covered with the sea or a navigable river, it is reasonable that he should have the soil where the water leaves it dry; and this stands on the ground of the prerogative.

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"But, where the right to the soil when covered with water belongs to a subject, he is entitled to all these increments. 2 Bl. Com., 262; Hale, *de Jure Maris*, chs. 4 and 6.

"This is illustrated by the law relative to islands arising in private rivers. If an island arises in the middle of such a river, it belongs in common to those who have lands on each side thereof; but, if it be nearer to one bank than to the other, it belongs only to him who is proprietor of the nearest shore. Yet this, says Sir William Blackstone (2 Com., 261), seems only to be reasonable when the soil of the river is equally divided between the owners of the opposite shores; for, if the whole soil is in the freehold of any one man, as it usually is, wherever a several fishery is claimed, there it seems just (and so is the constant practice) that the lyotts, or little islands arising in any part of the river, shall be the property of him who owneth the piscary and the soil. The rules relative to the sea and navigable rivers are formed on the same principles.

"This subject is very satisfactorily explained by Lord Hale in his *Treatise de Jure Maris*, chs. 4 and 6, to the whole of which I generally refer for the proof of the rule I have stated, that the right to a new island follows the right to the soil on which it was formed. This will be found from those chapters to be the rule with regard to all maritime increments. I will state here a few passages from them: 'If a subject hath had by prescription the property of a cer-

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tain tract, or creek, or navigable river, or arm of the sea, even while it is covered with water, by certain known metes and extends, though it should be relict, the subject will have the propriety in the soil relict.' Harg. Law Tracts, 15. 'If a subject hath land adjoining the sea, and the violence of the sea swallows it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quality and bounding upon the firm land the same can be known, though the sea leave the land again, or it be regained by art or industry, the subject doth not lose his property; and accordingly it was held by Cooke & Foster, M., 7 Jac. C. B., though the inundation continue for forty years. If the marks remain or continue, or extent can reasonably be certain, the case is clear.' *Id.*, 15.

"The case of the town of Shinbridge, in 18 Hen., III, is stated in page 16: 'The river of Severn had gained upon the town of Shinbridge so much that its channel ran over part of the Shinbridge lands, and lost part thereof unto the other side (Aure), and then threw it back to Shinbridge. It shall not belong to Aure, neither was it at all claimed by the king, though Severn be in that place an arm of the sea; but it was restored to Shinbridge as before. The propriety of the soil was not lost to the owners who had it before.'

"'The soil under the water must needs be of the same propriety as it is when it is covered with the water. If the soil of the sea while it is covered with

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water be the king's, it cannot become the subject's because the water has left it. But when the land, as it stood covered with water, did by particular usage or prescription belong to a subject, then *recessus maris*, so far as the subject's particular interest went while it was covered with water, so far the *recessus maris*, *vel brachii ejusdem*, belongs to the same subject.' *Id.*, 31."

We think it may be considered as settled that the soil under the Mississippi river, to the western boundary of the State, belongs to complainant, and that whenever it is abandoned by the water flowing over it, and no longer suitable or required for the purposes of commerce and navigation, when not done imperceptibly and in process of accretion, may be taken in possession and disposed of by the State as her authorities may see fit.

The change made by the river March 7, 1876, in its channel, did not alter the boundary line separating complainant and Arkansas, or affect the respective rights of those States, or those of the owners of lands abutting upon the river in the abandoned channel or bed. The channels of the rivers and other streams and bodies of water may and do become changed and their physical location altered by the forces of nature operating upon their shores or banks. When the change is made insensibly, by gradual and imperceptible washing away of one shore and the formation in like manner upon the other shore, it is said to be "by erosion and accretion." When it is made suddenly and violently,

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and is visible and the effect certain, it is called "avulsion." Where the boundary lines between individuals, as well as States and nations, are marked by streams, and the location of the stream is altered by erosion and accretion, it continues to be the boundary line; but, where the alteration occurs as the result of an avulsion, no change is made, but the limits of the private estates or national territory and jurisdiction remain as before. These principles are well settled at common law, and have been frequently applied by the courts of the various States and those of the United States. All the authorities in relation to this doctrine were reviewed by Mr. Justice Brewer in the great case of *Nebraska v. Iowa*, 143 U. S., 360, 12 Sup. Ct., 396, 36 L. Ed., 186, a case involving a dispute between those States concerning their joint boundary line, where the Missouri river, which marked the limits between them, had, in time of a great freshet, suddenly made a change in its channel similar to that in this case, across the 'neck of a bend therein, in the form of an ox bow, which was held to be an avulsion, and to leave the line between the States in the center of the old channel or bed of the river, where it had previously existed. This case is so exhaustive of the subject and ably considered that we make no apology for quoting from it at length. It is there said:

"It is settled law that when grants of land border on running water, and the banks are changed by that gradual process known as 'accretion,' the riparian

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owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possession may vary. In *New Orleans v. United States*, 10 Pet. (U. S.), 662, 717, 9 L. Ed., 573, this court said: 'The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' See, also, *Jones v. Soulard*, 24 How. (U. S.), 41, 16 L. Ed., 604; *Banks v. Ogden*, 2 Wall (U. S.), 57, 17 L. Ed., 818; *Saulet v. Shepherd*, 4 Wall. (U. S.), 502, 18 L. Ed., 442; *St. Clair County v. Lovington*, 23 Wall. (U. S.), 46, 23 L. Ed., 59; *Jefferis v. East Omaha Land Co.*, 134 U. S., 178, 10 Sup. Ct., 518, 33 L. Ed., 872.

"It is equally well settled that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary, and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, 'avulsion.' In Gould on Waters, section 159, it is said: 'But if the change is violent and visible, and arises from a known

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cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limit of the two estates.' 2 Bl. Com., 262; Angell on Water Courses, sec. 60; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. (Mass.), 544; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill., 535, 17 N. E., 439, 5 Am. St. Rep., 545; *Hagan v. Campbell*, 8 Port. (Ala.), 9, 33 Am. Dec., 267; *Murry v. Sermon*, 1 Hawks (N. C.), 56.

"These propositions, which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations are by prescription or treaty found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on the boundary, but leaves it in the center of the old channel. In 8 Op. Attys. Gen., 175, 177, this matter received exhaustive consideration. A dispute arose between our government and Mexico, in consideration of changes in the Rio Brava. The matter having been referred to Attorney-General Cushing, he replied at length. We quote largely from that opinion. After stating the case he proceeds:

" 'With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation on the other—that is, by gradual, and, as it were, insensible, accession or abstraction of mere particles—the river as it runs continues to be the boundary.

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One country may, in process of time, lose a little of its territory, and the other gain a little; but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged; and the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

“But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation through whose territory the river thus breaks its way suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed; for, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel and within given banks, which are the real international boundary.

“Such is the received rule of law of nations on this point, as laid down by the writers of authority. See, e. g., Puffend, *Jus Nat. lib.* lv, c. 7, sec. 2; Gundling, *Jus. Nat.*, p. 248; Wolff, *Jus Gentium*, secs. 106-109;

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Vattel, Droit des Gens, lib. 1, c. 22, secs. 268, 270; Stympanni, Jus Marit, c. 5, notes 476-552; Rayneval, Droit de la Nature, tom. 1, p. 307; Merlin, Repertoire, ss. voc. alluv.' ”

Further reference is made in the opinion to many authorities, among them Vattel, who states the rule thus (book 1, c. 22, secs. 268, 269, 270) :

“If a territory terminating on a river has no other boundary than that river, it is one of those territories that have natural or indeterminate bounds (*territoria arcifinia*), and it enjoys the right of alluvion; that is to say, every gradual increase of soil, every addition, which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side, or if it be given to me on that footing, I thus acquired beforehand the right of alluvion; and, consequently, I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say ‘insensibly,’ because in the very uncommon case called ‘avulsion,’ when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. The civil laws have thus provided against and decided this case.

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when it happens between individuals and individuals. They ought to unite equity with the welfare of the State, and the care of preventing litigations."

This full and able presentation covers all the law upon the subject of accretion and avulsion, and it seems useless to further discuss it; but we will cite some other cases in which the same doctrine is announced and applied: *Moss v. Gibbs*, 10 Heisk., 283; *Posey v. James*, 7 Lea, 98; *Stockley v. Cissna*, 119 Fed., 812, 56 C. C. A., 324; *Missouri v. Kentucky*, 78 U. S., 410, 20 L. Ed., 116; *Missouri v. Nebraska*, 196 U. S., 23, 25 Sup. Ct., 155, 49 L. Ed., 372; *Indiana v. Kentucky*, 136 U. S., 508, 10 Sup. Ct., 1051, 34 L. Ed., 329; *Rees v. McDaniel*, 115 Mo., 145, 21 S. W., 913; *Holbrook v. Moore*, 4 Neb., 437; *Collins v. State*, 3 Tex. App., 323, 30 Am. Rep., 142; *Buttenuth v. St. L. Bridge Co.*, 123 Ill., 546, 17 N. E., 439, 5 Am. St. Rep., 545.

We have, in the light of these authorities, no hesitancy in holding that the change made in its channel by the Mississippi river in 1876 at Centennial Cut-Off was an avulsion, and the limits of Tennessee and Arkansas, their respective rights in the abandoned channel, and those of individuals who owned lands lying and abutting upon it, all remained as they were before the formation of the new channel. The cut-off or formation of the new channel worked a great and important change in the course of this great river, shortening its length nearly twenty miles, driving the owners of nearly two thousand acres of valuable cultivated

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lands from their property, washing away the surface, and occupying it as a bed for its waters, and so affecting the old channel that it necessarily filled up in the usual way of beds of rivers abandoned by the stream, and became dry land. At the same time it separated from the other portions of Tennessee a large part of a civil district of one of its counties. The change was visible, and the ultimate effects certain and inevitable. It was accompanied with great and uncontrollable force and violence, and occurred in less than two days, a remarkably short time when the importance of its effects and results are considered. The change was complete. It began Friday morning, and before the next Sunday morning a channel of the usual width of the river, about a mile wide, had been washed out, and a steamboat passed through it that day in the usual course of navigation of the river. What had before been the channel of a great river, and a highway of the nations, became a lagoon and slough. It is difficult to conceive of a stronger or more conclusive case of avulsion, both in respect to the new channel thus made and the old one abandoned.

We are now to determine where the line between Tennessee and Arkansas should be located at the place where the lands sued for lie and are bounded by it. We are of the opinion that the true and correct line is midway between the banks of the river as they existed in 1823, as shown by the map of Maj. J. H. Humphreys.

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We are led to this conclusion by the following considerations:

We have seen that the line between the States was midway between the banks of the river as they existed in 1763. There is no direct evidence where they then were, and none can now be obtained. The earliest record of the location of the banks of the river is as they were in 1823, or between that date and 1830. The territory now composing the State of Arkansas was then a territory, and the lands belonged to the United States. Those bounded by the Mississippi river at the point in question, including Dean's Island, were surveyed and laid off into townships and sections, and these surveys and maps then made are now of record in the General Land Office of the United States. The lands upon the Tennessee side of the river, including what is now known as "Centennial Island" and "Island 37," which are directly opposite Dean's Island, were granted by the State of Tennessee, under the authority vested in it by congress, to various individuals, between 1822 and 1830. These grants and the entries and surveys upon which they were made are found in the proper offices of Tennessee. These surveys, covering both sides of the river, included all the lands there lying. They called for and adjoined each other, and other grants lying back of and behind them upon the main land. The original corners, landmarks, and lines are known and can be pointed out by those residing in the neighborhood. Maj. J. H. Humphreys, a competent civil

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engineer, surveyed the townships and sections upon Dean's Island, and the grants made by Tennessee upon Centennial Island and Island 37, and has constructed a map showing how all of the several tracts lie, and their location in respect to the banks of the river upon both sides, as they were originally surveyed. The width of the river between these banks was not shown in the original grants and surveys; but, when all the lines of the townships and grants were run and located upon the premises, it was an easy matter to measure the distance between those lines and thus ascertain it.

The correctness of the survey of Maj. Humphreys is not seriously controverted in this record, and we do not think it could be. It was evidently made in a careful manner, and is accurate and correct. The defendant Cissna concedes in his plea that this was the situation in 1823. The presumption is in favor of the permanency of boundary lines, and the burden of proof is upon the party averring that the location of a line has been changed by the action of the forces of nature. The defendant has undertaken to prove that a change took place in this case by accretion to Dean's Island, and erosion upon the opposite Tennessee bank. The exact contentions are that by erosion upon the banks of what are now Centennial Island and Island 37, and accretion to the banks of Dean's Island, since 1823, both before and after the cut-off in 1876, the middle of the river and the line separating the two States had advanced gradually westward towards the Tennessee

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bank, and that at the time of the cut-off the middle of the river was where the eastern boundary line of the Huddleston and Trigg lands had been before they were washed away and became part of the bed of the river, and, that being the boundary between the two States, complainant can recover nothing east of it, and, having previously granted that portion of the channel covering the Huddleston and Trigg lands, it cannot recover that, because those who hold under the original grants are entitled to such lands since restoration or reappearance, caused by the abandonment of the channel by the waters, and therefore the bill of complainant must be dismissed. We will dispose of these contentions in the order they are stated.

The great volume of the testimony introduced in this case by both parties was for the purpose of proving that the channel of the river at that place where the lands sued for now lie increased in width since 1823 and prior to 1876, and the extent of such increase, and by the complainant to prove that no accretions had formed upon Dean's Island after 1823, and by the defendants that the area of the island had in this way, since that date, been greatly increased and extended westward. Witnesses were examined who had lived and owned lands in the vicinity of the premises in dispute for many years before and after 1876, others who had navigated boats upon the river as captains and pilots during that period, and whose duty it was to be familiar with the

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river, its banks and channel, and still others who had never seen or known the premises until after the abandoned bed had filled up and had overgrown with timber. The chart made of the survey of Col. Suter in 1874, and others made by authority of the war department between 1878 and 1884, of the river, were introduced; and a number of civil engineers, including Col. Suter, who testified in the case, and undertook to read and interpret them. These witnesses differed considerably in their reading of the charts and what they show the condition of the premises to have been when the surveys upon which the charts are predicated were made. We will not undertake to analyze all this evidence. It would serve no good purpose, and only unreasonably extend the length of this opinion. We will only state the ultimate facts which we find to be established.

When the avulsion took place, by erosion from the Tennessee side, the width of the river south and west of Dean's Island had greatly increased, much more immediately south of that island than west of it, where the premises sued for are situated. While there is some conflict in the evidence, we find that at this place it had increased from perhaps a little less than one mile in 1823, to between one mile and a quarter and one mile and a half, and that the most, if not all, of this was the result of erosions from the Tennessee bank. This, we think, is clearly established by the testimony of the witnesses who had resided upon the lands in the neighborhood, and especially upon Centennial Island

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and Island 37, and of captains and pilots of steamboats navigating the river for many years previous to 1876, when the change in the channel took place. The lands lying upon the river, on Centennial Island and Island 37, were originally granted to Simon Huddleston, — Chalmers, and John Trigg. John Trigg had two grants, one for thirty-seven acres and one for 152 acres, lying immediately north of the first tract. A considerable portion of the eastern parts of the Huddleston grants, all of the Trigg thirty-seven-acre tract, and nearly all of the tract of 152 acres, and a part of the Chalmers tract, had been washed away, and the channel of the river at that time flowed, to that extent, over them. The location of these lands and their relative position to the river as it flowed in 1823 will be seen by inspection of the map of Maj. Humphreys. The eastern bank of the river, lying on the Tennessee side at this point, was rather a high bank, and when the cut-off took place, and the current of the river was changed and no longer flowed against this bank, erosion upon it ceased, and no change was subsequently made in it. It can now be seen, and its identity and location are conceded. The lands between this bank and the bank of Dean's Island as it was in 1823, which is also located with reasonable certainty, is all now dry land covered with timber, and, as before stated, is now the subject of this controversy.

We do not think that there were any accretions to Dean's Island previous to 1876. This is also clearly

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established by the evidence of witnesses who were living in the neighborhood and navigated the river immediately preceding the cut-off, and were thoroughly familiar with the situation as it then existed. They testify from their own observation and knowledge of the facts. They all state that while the towhead had appeared south and southwest of Dean's Island, and near and below it a sandbar and mud flats had formed, which were beneath the surface except in times of very low water, and that no land had formed along the banks of the island; that in medium stages of the river boats ran over this bar and these flats, and along the west and south banks of Dean's Island, and through the channel between it and the towhead; and that this was done by the largest boats then navigating the river. It is also clearly proven that the width of the channel of the river had increased fully, and perhaps more than, the erosions upon the Tennessee bank, and therefore there was no room for any accretions to the Arkansas bank. These are facts clearly established in this record, and to our minds they demonstrate that in 1876 there had been no appreciable change in the banks of Dean's Island since 1823.

Much stress is laid upon the chart made in 1874, under the direction of Col. Suter, and his interpretation of the topographical signs and tracings appearing upon it, tending to establish that at that time there was timber growing upon what is shown on the chart to be bars and banks in the river. Complainant also

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examined civil engineers, who undertook to interpret these maps and state what they showed in relation to accretions upon Dean's Island and the width of the river at the time they were made. This evidence is not entitled to very great weight. The chart is not the result of a careful survey of the river and its banks, but, in the main, from an inspection of it made from the deck of a steamboat. It was a mere steamboat reconnaissance. Col. Suter describes it as follows:

"I was assigned to what was called the 'transportation routes of the seaboard,' and the part assigned to me was the Mississippi river, from Cairo to the Gulf. In the summer of 1874—the summer and fall of that year—a certain sum of money was given to me to make an examination, and a party was put on a steamboat belonging to the government and instructed where to make a reconnaissance. The funds did not allow of an actual survey, and that was the best we could do. The idea was to get some idea of the condition of the river and the portions of it needing improvements. That party was organized in the latter part of the summer of 1874, I have not any data at hand that would give the exact date, but, near as I can recollect, they started in August. They went down the river from Cairo to Vicksburg, and then returned, and subsequently went over the same ground again, extending the examination as far as New Orleans. This particular part of the river which you allude to was passed over four times, twice downstream and twice upstream. The methods

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followed were somewhat crude, but were the best we could do. The party being, as I said, in a steamboat, the course of the boat was taken by a compass. The distance was determined by the speed of the boat, which had been accurately gauged before the party started. The widths of the river were, of course, estimated; but, where it was possible to stop for any length of time to get instructions ashore, the triangulations, and get the widths, it was done. That was used as a check, and there were other points that enabled some kind of a check on the width. The greatest difficulty was in the length, which, of course, the speed of the boat, varying with the current and all that, rendered it somewhat uncertain. The best that could be done was to take points, say thirty or forty or fifty miles, where anything could be recognized as a town that was shown on the State maps. It enabled the distance in the longitude and latitude to be determined approximately, and the lengths were determined by this reconnoissance. If the distance varied, they were shortened up all along the lines, according to the judgment of him who made the actual observations. There is one thing, of course, to be borne in mind in a case of this kind; that the examination was not made with any idea of determining actually by metes and bounds. That was not the idea, at all. It was to get a sketch, at any rate; something that the river looked like, and a general idea of its shape, direction, and location of the channel, and show points like that."

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Col. Suter does not testify from his personal recollection of the river and its banks. There was nothing about Dean's Island to attract his special attention to it, and its banks were a very small part of the reconnaissance made by him. He had not been there for nearly thirty years, and could only testify what he understood the topographical signs upon the chart to mean. The civil engineers examined for complainant read these signs differently, and under their interpretation the chart tended to support the insistence of complainant that no accretions had formed on Dean's Island at that time. These witnesses were never upon the premises until after this litigation began, and knew nothing of the real facts of the case. The testimony of all these witnesses is largely conjectural and speculative, and of that character that can only be relied upon in the absence of better testimony and from the necessity of the case. The chart which we have reproduced at a former page of this opinion, to our minds, so far as it shows anything, corroborates the statements of the witnesses for the complainant that, at the time of the survey, there were no accretions to Dean's Island. It shows the towhead and the sand bar or mud flats as part of the river, and not part of the land. This reconnaissance was made when the waters were at a very low stage, almost unprecedented in the history of the river, and the showing is therefore as favorable as it possibly could be to the theory that accretions had then formed.

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The defendants have introduced much testimony to show that cottonwood trees of an age which antedates the cut-off are found growing upon what was the old bed of the river, as evidence that there were accretions to the island previous to the cut-off. Sections cut from such trees have been produced in court, and the number of rings or circles in them, which, it is said, show the annual growth, pointed out as conclusive evidence of their age. We do not, under the facts of this case, attach much importance to this evidence. There is testimony in the record that the cottonwood in the alluvial bottoms of the Mississippi grows faster than any but one other known tree, and that trees of the size of these found on this land have been known to grow within the time elapsing since 1876. It also appears that dry land first appeared in the old channel along the mud flats and sand bars where the water was shallowest, upon the Arkansas side of the river, and that the formation there was black alluvion and very fertile, while at other places, near the Tennessee bank, appearing above the surface later, there was more sand, and, of course, less fertility. It is therefore, reasonable to suppose that the cottonwoods first began to grow upon the side next to Dean's Island, and have attained greater size there than they have on the Tennessee side. This, we think, clearly accounts for the difference in the size of the timber at the different places in the old channel, although there is conflict in the evidence as to whether this is in fact true. What are called annual

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rings or circles in these trees, according to the evidence, is not reliable testimony of their age. It appears that the trees are much affected by wet and dry seasons, and by cold weather, and that in some years more than one ring is formed. The sections produced in court were also evidently cut very near the surface, where the tree is abnormally enlarged, and are not fair specimens of the growth upon the land.

There is also testimony of several witnesses tending to show that there is an elevation along the old river channel, considerably west of the original Dean's Island bank, which they took to be and called the bank of 1876. This is mere speculation upon the part of these witnesses. They did not reside in the neighborhood previous to 1876, and they know nothing of the condition of things as they then existed. The witnesses examined in the case, old men who have lived in the neighborhood all their lives, and are familiar with the country and with the effects of freshets in the Mississippi river, say that there is no such bank; that what the defendants' witnesses took for banks are mere ridges or banks thrown up by the action of the water of the river during freshets, when the old bed was flooded, and the depressions near those banks mere channels that were washed out on such occasions.

While all the matters which it is insisted this character of testimony tends to establish are circumstances to be considered in ascertaining the ultimate fact of whether there were or were not accretions to Dean's

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Island previous to the avulsion, yet they are of a conjectural and speculative character, and cannot be held to outweigh or even equal the positive and uncontradicted testimony of witnesses who testify from personal knowledge and observation of the events and facts which they had the opportunity and which it was their interest and duty to observe and know. The statements of these living witnesses of the condition and location of the river and its banks at the place in question are reasonable and consistent with the admitted facts and the history of such occurrences, and we have no doubt but that they are true.

The question involved is the location of a boundary line. Its location in 1823 may be said to be a conceded fact. Every presumption is in favor of the permanency of the location of such lines. It is of the highest importance that their location should be certain and fixed. When a claim is made that a line of this character has been changed by the forces of nature, it must be supported by the clearest and most satisfactory evidence. This has not been done by the defendants in this case.

We are clear, also, that there were no accretions to the Arkansas bank after 1876. The doctrine of accretions has no application to the filling up of the old channel, abandoned by the river for a new one, as the result of an avulsion. The rights of the parties, in every respect, remain as they existed prior to the change. The proof conclusively shows that this change

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was sudden, violent, and complete; that it resulted in drawing off much of the waters of the old channel, and leaving those remaining still and stagnant, a mere lagoon; that it was no longer used by boats navigating the river, except occasionally by small craft when the waters were up; that the channel immediately began to fill with sand and other alluvial deposits; and snags, bars, and banks appeared in a short time above the surface, and willows and cottonwoods began to grow upon them. This process of filling up went on over the entire channel, but it is probable that land first appeared and vegetation first began to grow next to the Arkansas side, upon the sand bars and mud flats there previous to the cut-off, and the waters shallowest. This steadily proceeded until the old bed of the river became dry land, covered with valuable timber. This final result was evident from March 7, 1876, when the cut-off was made. The new channel was upon the direct general course of the river, and only about one-twentieth the length of the old one, and the fall in it was so great that it was a physical impossibility for the waters of the river to return to their old bed. In the nature of things and the history of such occurrences upon the Mississippi river, no one could doubt but that it would be only a few years at the furthest until the old bed should be entirely filled up and almost every vestige of its formerly being the channel of a great river gone. This effect of the avulsion was necessary, fixed, and certain, and inevitable. It is immaterial whether

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the land first appeared on one or the other side, because it was known and certain that the entire bed would be filled up and become dry land. The underlying reason for holding that boundary lines upon running streams may be changed by erosion and accretion, and that the States or individual proprietors separated by the stream may lose or gain territory and land, is that the loss and gain are so gradual and imperceptible that it is impossible to identify and follow the soil lost, or to prove where that gained came from. This is illustrated in the case of *Nebraska v. Iowa*, supra. In that case it was insisted that the doctrine of accretion had no application to the Missouri river, because of the rapid and great changes constantly going on in respect to its banks. The court, in disposing of this insistence, while admitting the facts, said:

“Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony: That, while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the ‘muddy’ Missouri; and also that while the disappearance, by reason of this process, of a mass of a bank may be sudden and obvious, there is no transfer of such a solid

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body of earth to the opposite shore, or anything like a visible and instantaneous creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other."

Thus in effect it was held that the loss must be suffered, because it was impossible for the losing party to follow and identify his property. It would hardly be contended, if the avulsion in this case had immediately resulted, by great deposits of alluvion and drawing off of the waters of the abandoned channel, in drying them up, that because land first appeared upon the Arkansas bank, where the waters were shallowest, it was an accretion to that bank. The principle is not changed because it took a period of several years

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to accomplish the same fixed, known, and inevitable result. The filling up of the old channel in this case was independent of the riparian rights and worked no change in them. In the case of *Willey v. Lewis*, 28 Wkly. Law Bul., 104, decided by the court of common pleas of Ohio, where a stream changed its channel and the old bed gradually dried up, the question was whether the doctrine of accretion applied. The court said:

"In the case at bar, until the new channel was cut through, the water ran in the old channel as above located. When the new channel was cut through, the river ran through that, and the old channel became an abandoned channel. The change was sudden and rapid; was avulsion, as distinguished from an imperceptible change, or accretion. A change of channel could not, in the nature of things, be instantaneous. It must require a certain time. But if it is rapid, sudden, and distinguishable from an imperceptible change, I think under this late case it must be controlled by the law of avulsion. I see no middle course. It must be either accretion or avulsion. I do not think it an answer to say that some water still ran in the old channel until it eventually dried up. That must necessarily be the case in every change of channel; and, if it were an answer, then the proposition that the boundary remains as it was would be a myth."

It is not every gradual change of the channel of streams caused by filling up with deposits cast by the

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waters that will, as an accretion, change the boundary lines of either States or riparian proprietors. This was held in the case of *Missouri v. Kentucky*, 11 Wall. (U. S.), 395, 20 L. Ed., 116. The main channel of the Mississippi river originally ran west of Wolf Island, and the island was part of the territory of the State of Kentucky. Through a period of several years the western channel gradually filled up, and the main channel shifted to the east of the island. The State of Missouri claimed jurisdiction over the island on this account, and brought suit against the State of Kentucky to establish such jurisdiction. It was held, notwithstanding the change was slow and gradual, yet, since there was no doubt where the State line ran, it was not changed by the change in the flow of the waters, and the suit dismissed.

The case of *Indiana v. Kentucky*, 136 U. S., 479, 10 Sup. Ct., 1051, 34 L. Ed., 329, was a similar case and involved jurisdiction over Green River Island in the Ohio river. When the State of Kentucky was originally admitted into the union, the main channel of the Ohio river, upon the northern bank of which, at low-water mark, the line separating Kentucky and the Territories north of it ran, was north of this island. Afterwards by slow process of accretion and filling up the channel changed to the south of the island, and Indiana claimed jurisdiction over it, and brought suit to enforce such jurisdiction. It was held that, it appearing that the island was originally within the limits of

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Kentucky, the jurisdiction over it was not lost by the change in the channel of the river.

The case of *Hughes and Others v. Heirs of Birney and Others*, 107 La., 664, 32 South., 30, is also analogous to this. Previous to 1876 the Mississippi river, opposite the city of Vicksburg, Mississippi, reversed its course and ran northwards for some distance, then eastward, then southward, pursuing its general course, forming a long, narrow tongue of land, called "De Soto Point," and owned by some eight or more different proprietors. In that year, 1876, the river made a new channel for itself, cutting across the tongue of land near its northern extremity. This cut-off by erosion gradually swept away all the land south of it, until it reached the southern extremity of the tongue, where it made for itself a new and permanent channel, through which the current ran, and all the old channel, including that made in the erosion, became a lake, called "Lake Centennial." About eight months elapsed from the time the first cut-off was made until the permanent channel was reached and formed. The lake then, where there was formerly land upon the tongue, began to fill up, bars appeared above low water in about three years, and gradually became dry land fit for cultivation and habitation. The owner of the northern extremity of the tongue, which was not washed away, claimed it as accretion to her land. The court held that this claim could not be maintained, but that the land, being subject to survey and identification, was

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the property of those who owned it at the time the surface was washed away; that the ownership of the soil carries with it all that is directly above and under it; that ground upon which the river rested temporarily, in going over that portion of De Soto Point, never ceased to belong to the defendants, the heirs of Birney, and deposits placed upon it by the river in retiring from it, having been put upon land belonging to them, became likewise their property; and that the doctrine of reappearance of land after submergence controlled the case.

The formation of dry land in the old channel of the river opposite Dean's Island, was not an accretion to either bank of that channel, but a filling up by deposit from the bottom of the old bed of the river, until it emerged from the water and became habitable and susceptible of cultivation. It was not in any way built upon the banks or aided by them. The new soil did not accrete to the banks, but built up on that of the owners of the old bed. It was not an accretion to anything, but an emergence of land, that had been theretofore covered by the waters, caused by an avulsion, and was and is the property of those who held it in its submerged condition. The channel of the river as it flowed in 1876, when the cut-off took place, covered the channel occupied by it in 1823, and part of the grants of Simon Huddleston, ——— Chalmers, and John Trigg, formerly on the eastern shores of Centen-

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nial Island and Island 37. When the waters of the river abandoned these lands, and they emerged and became dry land, the owners, in this case the State and the grantees, Huddleston and others, and not the then abutting riparian proprietors, were entitled to them. This is well-settled law. In the case of *Mulry v. Norton*, 100 N. Y., 426, 3 N. E., 585, 53 Am. Rep., 206, it is said:

“It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner or enables another to acquire it; for the erosion must be accompanied by transportation of the land beyond the owner’s boundary to effect that result, or the submergence followed by such lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the main land have been gradually encroached upon by the ocean, so that navigable channels have been extended therefrom, the people by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels—to ownership of the land under them in cases of its permanent acquisition by the sea. It is clearly true, however, that when the waters disappear from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of

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the water by artificial means, its proprietorship returns to the original riparian owners."

To the same effect are the cases, above cited, of *Morris v. Brooke* (Del.), cited in *Mulry v. Norton*, 53 Am. Rep., 215, note; *Hughes et al. v. Heirs of Birney et al.*, 107 La., 664, 32 South., 30; *Hardin v. Jordan*, 140 U. S., 382, 11 Sup. Ct., 808, 838, 35 L. Ed., 428; *St. Louis v. Rutz*, 138 U. S., 226-246, 11 Sup. Ct., 337, 34 L. Ed., 941; *Stockley v. Cissna*, 119 Fed., 831, 56 C. C. A., 324.

This was the rule of the common law, and it applies, as is fully shown in the authorities we have cited, in favor of the State and of individuals, and as well to cases of emergence of lands which have in all known times been covered by the sea or navigable rivers, as well as those which have been submerged and reappeared again. If the soil under the waters belonged to an individual, the dry land appearing is his property; and if the submerged soil belonged to the State, when it is abandoned by the waters and becomes habitable and susceptible of cultivation, it remains her property. Clearly, the position of the defendants, that the State is not entitled to recover the portions of the channel covered by the grants to Huddleston, Trigg, and Chalmers, is sound. These parties, or their assigns, are entitled to them. *Morris v. Brooke*, supra; 2 Bl. Com., 262; Hale, de Jure Maris, chs. 4 and 6.

What, then, are the rights of the States of Tennessee and Arkansas in the premises in controversy, and what

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is the true location of the line between them? We think, unquestionably, that the bed of the abandoned river should be divided between them, for we apprehend that the Arkansas side belongs to that State, since the title of riparian owners under its laws is limited to high-water mark. *Railroad v. Ramsey*, 53 Ark., 314, 13 S. W., 931, 8 L. R. A., 559, 22 Am. St. Rep., 195. The line separating their respective jurisdictions is to be run along the channel midway between the banks as they existed and were surveyed in 1823, as shown in the map made by Maj. J. H. Humphreys, and exhibited with the bill of complainant. This was the line between Tennessee and the Territory of Louisiana when the former became a State and was admitted into the union. It was the line between Tennessee and that Territory after it was purchased by the United States, as is shown by the surveys and grants upon both banks of the river made between 1822 and 1830; and the only occurrence tending to show a change in it since that date is the widening of the river between then and 1876 by erosion on the Tennessee bank to the extent of submerging the lands there, constituting a part of the grants made to Simon Hudleston, ——— Chalmers, and John Trigg. The same rule that entitles those parties to their lands when abandoned by the river also entitles Tennessee to its original one-half of the river bed. This is the natural and necessary result of the avulsion. The effect of it was to press back the line of the State, as it ran at low-water mark, to the eastern boundary line along the river bank to the

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grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of the old channel, as it ran previous to the submergence of those grants, the line between the two States, so as to restore to Tennessee what it held before the erosions upon its banks. The right of restoration to their lands was one of the vested rights of those grantees, and the right of Tennessee to be restored to her share of the original channel was one of her vested rights. These were the rights of the parties that existed at the time of the avulsion, and were fixed and settled by it, and which they had the right to have worked out and adjusted.

It restores all parties to their original status, and does justice to them all. If the result of the avulsion had only affected the waters of the river, so far as to cause them to recede from the lands of the riparian proprietors on the Tennessee bank and occupy the channel as it existed in 1823, it would not be denied that the line would now be the center of the bed as it was in 1823. That the entire old bed was abandoned cannot change the rights of the parties. The others interested cannot be restored to their own by the forces of nature, and Tennessee entirely eliminated and denied any benefit of the reliction of the waters. She cannot in this way be deprived of the property, when the same can without doubt be identified and located.

It is said that complainant only sued for the land lying west of the center of the channel as it was in 1876,

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and therefore cannot recover to the center of the channel of 1823. This is true; but this case must be remanded, for a hearing upon the answers of the defendants, and, if it is desired, the bill may then be amended, so as to make the proper averments to entitle her to recover under the principles here settled.

Reversed and remanded.

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H. W. STOCKLEY v. W. A. CISSNA *et al.*

(*Jackson*. Special September Term, 1907.)

1. **REMOVAL OF CAUSES.** By filing certified copy of record in the federal court, when.

Where the petition, proceedings, and evidence touching the refused application for the removal of a cause from the State court to the federal court were preserved of record by a bill of exceptions, the filing of a certified copy of the record, together with a good and sufficient bond, in the federal court, operates, under the acts of congress and the federal decisions, as a removal of the cause. (*Post*, pp. 141, 142.)

Cases cited and approved: *Martin v. Railroad*, 151 U. S., 675.

2. **SAME.** Same. Defendant cannot complain of refusal to grant removal where he effected a removal in another way.

The defendant cannot, in the supreme court, complain of the chancellor's refusal to grant a removal to the federal court, where it appears that the defendant had the full benefit of the removal in the mode stated in the first headnote, and where the federal court remanded the cause back to the State court. (*Post*, pp. 141, 142.)

3. **SAME.** Action of federal court on removal of cause is conclusive on State court.

The action of the federal court in remanding a cause removed from the State court is conclusive on the State supreme court. (*Post*, pp. 142, 143.)

4. **CONTINUANCES.** Action of trial court not disturbed by supreme court, except for great abuse of discretion.

It is the established practice of the supreme court not to interfere with the discretionary action of the trial court on the subject of continuance, unless it appears there has been great abuse of its discretion. (*Post*, p. 143.)

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Cases cited and approved: *Rhea v. State*, 10 Yerg., 258; *Todd v. Wiley*, 3 Humph., 576; *Womack v. State*, 6 Lea, 152; *Railroad v. Voss*, 109 Tenn., 722; *Fox v. State*, 111 Tenn., 158.

5. SAME. Same. Case in judgment.

The refusal of a second continuance asked by defendant at the June term, 1905, will not be disturbed by the supreme court, where a plea in abatement was filed in January, 1904, and the replication February, 1904, and the defendant obtained a continuance at December term, 1904, and having failed to take proof under the plea, when refused the second continuance. (*Post*, pp. 143, 144.)

6. RES ADJUDICATA. Judgment in ejectment is not a bar to an action for forcible entry and detainer.

The action of ejectment is a real action involving the legal title, while the action of forcible entry and detainer is a possessory action involving the right of possession only, and not the legal title, so that the same issues are not involved in both actions, and, therefore, a judgment in the ejectment suit is not a bar to a forcible entry and detainer action, though the parties and the land involved be the same, and though the judgment in ejectment is conclusive, with certain exceptions. (*Post*, pp. 144-152.)

Code cited and construed: Secs. 4970, 5000, 5001, 5103 (S.); secs. 3953, 3983, 3984, 4085 (M. & V.); secs. 3229, 3252, 3253, 3354 (T. & S. and 1858).

Cases cited and approved: *Edwards v. McConnel*, Cooke, 305; *Estill v. Taul*, 2 Yerg., 467; *White v. Suttle*, 1 Swan, 174; *Elliott v. Lawless*, 6 Heisk., 124; *Brewster v. Galloway*, 4 Lea, 567; *Hubbard v. Godfrey*, 100 Tenn., 150; *Bank v. Smith*, 110 Tenn., 337; *Borches v. Arbuckle*, 111 Tenn., 498; *Peyton v. Smith*, 5 Pet. (U. S.), 485; *Stockley v. Cissna*, 119 Fed., 812; 56 C. C. A., 324; *Railroad v. Tibbs*, 112 La., 51; *Riverside Co. v. Townsend*, 120 Ill., 16; *Fish v. Benson*, 71 Cal., 429; *Swanson v. Smith*, 117 Ky., 116; *Fain v. Miles* (Ky.), 60 S. W., 939.

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7. **STATE BOUNDARIES.** Line between Tennessee and Arkansas was not changed by new channel, called "Centennial Cut-Off," made in 1876.

The boundary line between the States of Tennessee and Arkansas was not changed by the new channel, called "Centennial Cut-Off," which the Mississippi river suddenly and violently cut for itself in 1876, leaving between the old channel and the new channel a large body of land, called "Centennial Island," which boundary remained where it was originally fixed, which is determined to be the middle of the old channel of the said river as it ran in 1823, as shown on the Humphreys' map, appearing on page 155. (*Post*, pp. 152-163.)

Cases cited and approved: *State v. Muncie Pulp Co.*, 119 Tenn., 47; *Nebraska v. Iowa*, 143 U. S., 359; *Missouri v. Nebraska*, 196 U. S., 33; *Stockley v. Cissna*, 119 Fed., 812, 56 C. C. A., 324.

8. **STREAMS.** Actual possession of contiguous shore land does not create constructive possession of land formed by avulsion, so as to authorize action of forcible entry and detainer therefor. A riparian owner is not entitled to land forming against his land by an avulsion, and hence constructive possession does not attach to such newly formed land by reason of his actual possession of the contiguous shore land, so as to enable him to maintain an action of forcible entry and detainer for the newly formed land. (*Post*, pp. 163-166.)

Case cited and approved: *Stockley v. Cissna*, 119 Fed., 812, 56 C. C. A., 324.

9. **AVULSION.** Avulsion is none the less so because the old channel does not dry up until ten years elapse.

Where a river suddenly makes for itself a new channel, there is no less an avulsion because the old channel does not immediately dry up, and ten years or more elapse before all the water therein disappear. (*Post*, pp. 165, 166.)

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- 10. RES ADJUDICATA.** Adjudication in ejectment that grant is void is conclusive in subsequent forcible entry and detainer action, when.

An adjudication in an action of ejectment that a State grant to complainant was void is conclusive between the same parties in a subsequent action of forcible entry and detainer. (*Post*, pp. 166-170.)

Case cited: *Stockley v. Cissna*, 119 Fed., 813, 56 C. C. A., 324, and citations.

- 11. FORCIBLE ENTRY AND DETAINER.** Cutting timber and grazing stock on part of tract will not support this action for other part, when.

The fact that complainant, from time to time, cut timber and grazed stock on a certain part of a tract of land held under an instrument describing the whole tract does not show such actual possession thereof as will extend the constructive possession to the other part, so as to be sufficient to support an action of forcible entry and detainer for that other part, and especially where the user was not shown to be continuous and uninterrupted. (*Post*, pp. 170, 171.)

Cases cited and distinguished: *Davidson v. Phillips*, 9 Yerg., 93; *Brown v. Johnson*, 1 Humph., 262; *Rutherford v. Franklin*, 1 Swan, 322; *Hopkins v. Calloway*, 3 Sneed, 11; *Phillips v. Simpson*, 2 Head, 430; *Mansfield v. Northcut*, 112 Tenn., 536.

- 12. SAME.** Possession of part is in law possession of the whole tract so as to support an action of.

The possession of part of a tract of land under an instrument, though merely in the nature of a quitclaim deed, describing the boundaries of the tract, is in law the possession of the whole tract, sufficient to support an action of forcible entry and detainer. (*Post*, pp. 169, 170, 173, 174.)

Cases cited and approved: *Brown v. Johnson*, 1 Humph., 262; *Rutherford v. Franklin*, 1 Swan, 322; *Mansfield v. Northcut*, 112 Tenn., 536.

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13. STREAMS. Avulsion does not extinguish title, for reappearance of land restores title and right to possession.

The fact that land is swept away by avulsion does not extinguish the owner's title, for, when the land reappears above the water, there is a restoration of title and right to possession.

(*Post*, pp. 171-177.)

Cases cited and approved: *Stockley v. Cissna*, 119 Fed., 813, 56 C. C. A., 324; *Mulry v. Norton*, 100 N. Y., 426, and citations.

FROM TIPTON.

Appeal from the Chancery Court of Tipton County.—
JOHN S. COOPER, Chancellor.

G. J. McSPADDEN, for complainant.

CARUTHERS EWING, for defendant Cissna.

R. G. BROWN, for defendant, Muncie Pulp Co.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

This is an action of forcible entry and detainer. The object of the bill is to recover the possession of two tracts of land situated in Tipton county, Tennessee. These tracts adjoin, but are described in the bill separately, for the reason that complainant's title and right of possession to each is derived from a different source.

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The smaller of the two tracts comprises about one hundred and thirty-one acres, and is embraced in a tract of two thousand acres originally granted in the year 1824 by the State of Tennessee to Simon Huddleston. The larger tract, comprising about 1,050 acres, adjoins the smaller tract on the north, and was originally granted by the State of Tennessee to John Trigg. The bill alleged that while complainant was in the quiet and peaceable possession of the two tracts of land, fully described in the bill by metes and bounds, the defendants had ousted him from possession, and had cut and removed from the land timber to the value of \$20,000, as he is informed and believes. Complainant prayed to be restored to the possession of the land and for a decree against the defendants for the value of the timber appropriated. On the hearing the chancellor pronounced a decree in favor of complainant, adjudging him entitled to the possession of the land in controversy, and ordering a reference to ascertain the amount of timber cut and removed from the land, and to ascertain the value thereof. The chancellor permitted the defendants to appeal from said decree, and the cause is now before this court, mainly on the assignments of error on behalf of the defendant W. A. Cissna.

We shall first notice the error assigned on the refusal of the chancellor to order a removal of the cause on the petition of the defendant to the circuit court of the United States for the western division of the western district of Tennessee. The bill was filed June 10, 1903,

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and publication ordered for the nonresident defendants to make their appearance in the cause on or before the first Monday in August, 1903, and make defense to the bill. The regular terms of court convened on the first Mondays in June and December. It thus appears that the first term of the court after the bill was filed was held on the first Monday in December; but, as already seen, the publication for the nonresident defendants required them to enter appearance on a rule day in August, 1903. It appears that on October 17, 1903, the defendants filed their petition for a removal of the cause, and a proper bond was tendered with the petition. On November 17, 1903, complainant filed a motion to dismiss the petition for removal to the United States court on the ground that it was filed after the time defendants had the right to file it under the act of congress. It thus appears that the ground upon which the petition for removal was denied was that it was filed unseasonably. Thereupon, on the 19th day of December, 1903, defendants applied for leave to file an amended petition for removal, which was disallowed by the court. The petition, proceedings, and evidence touching the application for the removal were preserved of record by a bill of exceptions. Defendant Cissna assigns the following exceptions to the action of the court in refusing his petition for removal:

“(1) Said petition was filed in time.

“(2) The petition as amended, and which the court declined to allow to be filed, was filed after an amend-

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ment of the bill was made which made the suit an action in ejectment, and therefore the defendants were entitled to a removal.

“(3) No motion was made to dismiss, because the petition was not filed in time.”

We find, however, that an examination of these questions is unnecessary, since the record shows that as a matter of fact the cause was removed to the United States circuit court, and by that court remanded to the State court. It appears from the record that, after the refusal of the chancellor to order a removal, counsel procured from the clerk and master a certified copy of the record, and filed it, together with a good and sufficient bond, in the United States circuit court at Memphis. This action operated, under the act of congress and the federal decisions, as a removal of the cause. It further appears that counsel for complainant appeared in the federal court and moved to remand the cause to the chancery court of Tipton county. After argument of counsel and consideration by the court, the cause was ordered to be remanded to the chancery court of Tipton county, which was accordingly done on the 7th day of April, 1905. We think it very plain that the defendants had the full benefit of their petition for removal by the course adopted in filing a certified copy of the record in the United States court. *Martin v. Baltimore & Ohio R. R.*, 151 U. S., 675, 14 Sup. Ct., 533, 38 L. Ed., 311.

The action of the United States circuit court on the

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removal of the cause is, of course, final and conclusive on this court.

It is also assigned as error that the chancellor refused to grant defendants' application for a continuance at the June term, 1905. It appears that the plea in abatement filed on behalf of defendant Cissna averred that the lands in controversy were situated in the State of Arkansas, and not in the State of Tennessee. Complainant joined issue on the plea in abatement. It appears that at the June term, 1904, the cause was continued by consent until the next December term of the court. The cause was again continued at the December term, 1904, to the June term, 1905, when it was called for hearing on the plea in abatement. Counsel for defendant thereupon made application for a continuance, supported by affidavit. It is the established practice of this court not to interfere with the discretionary action of the trial court on the subject of continuance, unless it appears there has been great abuse of its discretion. *Womack v. State*, 6 Lea, 152; *Todd v. Wiley*, 3 Humph., 576; *Rhca v. State*, 10 Yerg., 258; *Fox v. State*, 111 Tenn., 158, 76 S. W., 815; *Railroad v. Voss*, 109 Tenn., 722, 72 S. W., 983.

It appears that the plea in abatement was filed January 16, 1904, and the replication on February 22, 1904. The burden of proof to sustain this plea, of course, devolved upon the defendant, and under the rules of chancery practice four months were allowed defendants in which to take their proof, and the complainant was

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entitled to two months thereafter in which to take his proof. At the December term, 1904, defendants had not taken their proof, and when the cause was called a continuance was asked, which was supported by affidavit. Continuance was allowed by the chancellor. At the June term, 1905, defendants had still failed to take their proof in support of the plea in abatement, and again requested a continuance. The court overruled the application, and, in view of the facts already stated, we are unable to perceive wherein the chancellor was guilty of an abuse of the discretion allowed him in such matters. The chancellor then, at the June term, 1905, proceeded to hear this plea in abatement, and overruled the same, adjudging that the lands in controversy were not in the State of Arkansas, but were situated in the State of Tennessee. At the same term, to wit: on June 20, 1905, the defendants filed their answer, in which they denied all the material allegations of the bill. Defendants embodied in their answer a plea of *res adjudicata*, averring the present action to be barred by the suit of *H. W. Stockley v. W. A. Cissna*, tried and determined in the United States circuit court.

We shall first consider the defendants' assignment of error on the action of the chancellor in overruling the plea of *res adjudicata*. That plea averred that the present suit was barred by a decree pronounced by the United States circuit court for the western division of the State of Tennessee, and affirmed on writ of error

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by the circuit court of appeals (119 Fed., 812, 56 C. C. A., 324), which was a litigation between the same parties and about the same subject-matter, wherein the decree was in favor of the defendant Cissna, and complainant's bill was dismissed. The suit instituted by complainant, Stockley, in the circuit court of the United States, was in ejectment, and for the purpose of establishing title to and recovering the possession of the same lands now in controversy. We find in the record a stipulation of counsel in which it is agreed that H. W. Stockley, the complainant herein, was the complainant in the federal court suit, and that W. A. Cissna, one of the defendants herein, was the W. A. Cissna who was the defendant in the federal court case, and it is further agreed that the lands mentioned and described in the declaration in said suit are the same lands that are mentioned and described in the original bill filed in this cause. The distinctive feature between the two suits lies in the fact that the original suit in the United States court was in ejectment, while the present suit is an action of forcible entry and detainer. It is stated on the brief of counsel for appellant that on the 17th day of November, 1903, an amendment was made in the chancery court of Tipton county, which made this case a suit in ejectment, as well as one for forcible entry and unlawful detainer. In this statement counsel is in error. It is true a written motion for leave to amend the bill was filed on November 17, 1903; but the court did not

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meet until Monday, December 7, 1903, twenty days thereafter. When the court convened this motion was not presented, and no order or decree was pronounced upon it. No leave was ever given complainant to amend his bill, and as a matter of fact it was not amended, so as to convert it into an action of ejectment. The motion originally filed November 17, 1903, was waived by the complainant, and the action still remained one for a forcible entry and detainer, as commenced by that bill. It is said the records show that the complainant in the case at bar relies entirely upon the same muniments of title as relied upon by him in the federal court, and that complainant has not acquired any title subsequent to the determination of that case. It is then argued that, not only by statute, but by general law, the decision of the federal court is *res adjudicata* and a good defense to the present action. The section of the Code invoked is Shannon's Code, section 5000, relating to a judgment in ejectment, as follows:

"Any such judgment is conclusive upon the party against whom it is recovered, not under disability at the time of the recovery, and all persons claiming under him by title accruing after the commencement of the action."

It may be conceded that a judgment in ejectment under the section of the Code quoted, as well as under well-recognized rules of law, is binding upon all parties to the action and their privies in all cases where the title is the subject of litigation; but the question remains

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whether a judgment in ejectment against the complainant forever settles the question of the complainant's right of possession to said land. It is argued that this must be so because in ejectment both the title and the right to immediate possession are material issues. Shannon's Code, section 4970, provides as follows:

"Any person having a valid subsisting legal interest in real property and right to the immediate possession thereof may recover the same by an action of ejectment."

It is said the same possession and the same expulsion alleged and relied on in the action of ejectment are relied on in the present action of forcible entry and detainer; that in the first action plaintiff sought to recover the land, and in order to do so it was necessary that he should show a legal title and right of possession; whereas, in the present action, he must have the right to immediate possession, but need not establish a legal title. It is said the right to immediate possession was a material fact determined by the judgment in the first case, and cannot again be litigated. The question of right to an immediate possession, it is true, was present in the ejectment suit, and it is insisted was concluded by the judgment therein. In 24 Am. & Eng. Ency. of Law (2d Ed.), p. 780, it was said:

"From these illustrations it will appear that it is not the identity of the thing sued for or of the cause of action which determines the conclusiveness of a former judgment upon a subsequent action, but merely the

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identity of the issue involved in the two suits. If an issue presented in a subsequent suit between the same parties or their privies is shown to have been determined in a former one, the cause is *res adjudicata*, although the actions are based on different grounds, or tried on different theories, or are instituted for different purposes and seek different relief. The test of identity is found in the inquiry whether the same evidence will support both actions."

Applying these tests: (1) Was the issue involved in the two suits identical? (2) Did the same evidence support both actions?

In the original suit a very elaborate and learned opinion was delivered by Circuit Judge Lurton in the circuit court of appeals, and is reported in 119 Fed., 812, 56 C. C. A., 324. It appears from the opinion that the suit was in ejectment to establish title to the tracts of land in controversy, and attention was called to the distinctive attributes of the two actions—that in ejectment, and that in forcible entry and detainer. The complainant failed in that action because of defective links in his chain of title, and because he did not show a perfect legal title. It was insisted, nevertheless, that complainant had such possession of the land in dispute as to entitle him to recover in that action. In respect to this contention, Judge Lurton said:

"The plaintiff has not chosen to resort to the Tennessee statutory action of unlawful entry. That is an action which tries only the immediate right of possession,

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and lies whenever there has been an actual trespass resulting in a tortious dispossession. On the contrary, he has brought a straight action of ejectment, which in Tennessee is something more than a mere possessory action, inasmuch as the judgment, contrary to common law, is conclusive on the parties, saving to persons under disability another action three years after the removal of the disability. Shannon's Code, sections 5000, 5001. Whatever may be the right of the plaintiff in other jurisdictions to recover in ejectment upon proof of mere possession at the time of defendant's entry, in Tennessee the rule is well settled that the plaintiff cannot recover in ejectment unless he shows a perfect legal title, either by deraignment from the State or by evidence of actual occupation under deeds purporting to convey the title for the full term of seven years"—citing *Hubbard v. Godfrey*, 100 Tenn., 150, 47 S. W., 81, and many other cases.

It thus appears from the opinion of Judge Lurton that the original action was not one of forcible entry and detainer, but an action of ejectment purely, to try the question of title. It was expressly held that complainant was not entitled to recover in that action upon proof merely of the right to possession. It was held by this court in *Borchers v. Arbuckle*, 111 Tenn., 498, 78 S. W., 266:

"That, where the judgment is silent upon a point, the opinion of the court may be looked to, in connection with the decree or judgment, for the purpose of determining

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what was really decided by the court and intended to be adjudged."

When we look to the opinion of Judge Lurton, we find the United States circuit court of appeals expressly declined to determine the question of possession in that action. In this connection we think the language of the supreme court of Louisiana in *Vicksburg, S. & R. R. Co. v. Tibbs*, 112 La., 51, 36 South., 223, very apposite:

"Whatever force there may be in the general proposition that a judgment as to the ownership of a portion of the tract of land is conclusive between the same parties claiming under the same title as to the ownership of the whole tract, the fact remains that a final judgment in a particular case is the law of that case; and when such judgment in terms declares that one title is at issue, and another is not, it cannot constitute *res adjudicata* as to the title held to be not at issue."

It thus appears that the judgment of the court in which the original suit was tried is conclusive as to what issues, rights, or titles were therein involved and adjudicated. The rule is firmly settled in Tennessee that ejectment is a real action, and, in order to entitle the plaintiff to recover, he must prove a valid and legal title to the land in controversy. *Hubbard v. Godfrey*, 100 Tenn., 150, 47 S. W., 81.

It is equally well settled that the action of forcible entry and detainer is a possessory action, wherein the right of possession only is involved, and the legal title cannot be determined. Shannon's Code, section 5103;

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Ellkott v. Laucless, 6 Heisk., 124; *White v. Suttle*, 1 Swan, 174.

Hence it is impossible that the same issues are involved in both actions, and there is no room for the application of a judgment by estoppel, whether the original judgment be found upon the one or the other of the two actions.

The adjudication, to be conclusive, should be upon the very point brought directly in issue by the pleading. *Edwards v. McConnel*, Cooke, 305; *Brewster v. Gallo-way*, 4 Lea, 567; *Bank v. Smith*, 110 Tenn., 337, 75 S. W., 1065; *Estill v. Taul*, 2 Yerg., 467, 24 Am. Dec., 498.

The original suit of *Stockley v. Cissna* obviously involved the title to the property, while the present suit only involves the right of possession. It thus appears that the issues presented in the two actions are entirely dissimilar. Under the Code, in order to maintain ejectment, it was necessary, not only to show a legal title, but a right to the immediate possession of the land. Failing to show a legal title, the right of action must inevitably fail, although a right of possession might have been established. In the action of forcible entry and detainer, if the right of possession is established, plaintiff is entitled to a recovery, and he is not required to show a legal title. In *Riverside Co. v. Townshend*, 120 Ill., 16, 9 N. E., 65, the court said:

"But a judgment in an action of forcible entry and detainer cannot be treated as a bar to an action of ejectment, for the reason that the questions involved in the

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two proceedings are different. The object of the action in ejectment is to try the title to property, while in an action of forcible entry and detainer the immediate right of possession is all that is involved and title cannot be inquired into for any purpose." *Peyton v. Stith*, 5 Peters (U. S.), 485, 8 L. Ed., 200; *Fish v. Benson*, 71 Cal., 429, 12 Pac., 454; *Swanson v. Smith*, 77 S. W., 700, 117 Ky., 116 (1903); *Fain v. Miles* (Ky.), 60 S. W., 939 (1901).

Without further elaboration of this subject, we are of opinion that the action of the chancellor in overruling the plea of *res adjudicata* interposed on behalf of defendant was correct.

Our next inquiry shall be whether the land in controversy is situated within the limits of the State of Tennessee. This question is raised by the plea in abatement, interposed on behalf of defendant Cissna, averring that said lands are situated in the State of Arkansas, and therefore the courts of Tennessee are without jurisdiction to entertain the present action. It may be remarked in the first place that the two tracts of land in controversy, one containing 1,050 acres and the other 131 acres, more or less, constitute a body of new-made land which was formed as the result of an avulsion of the Mississippi river in suddenly forsaking its main channel and cutting a shorter channel across the neck of a bend of the river, known as the "Devil's Elbow," some thirty or forty miles above the city of Memphis. It appears that the distance by the old channel of the river

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around the bend was from fifteen to twenty miles, while the distance across the neck by the new channel was less than two miles. This new channel was formed in the space of twenty-four hours in the month of March, 1876, and in commemoration of that event, which occurred in the one hundredth year of American Independence the channel has since been denominated the "Centennial Cut-Off." An island was formed from the eastern shore of the old channel, which is now known as "Centennial Island." The topography of the country, as well as the course of the Mississippi river prior to the Centennial Cut-Off, is accurately illustrated by the map of Maj. J. H. Humphreys, filed in this cause and marked "Exhibit A" to the deposition of J. H. Humphreys.

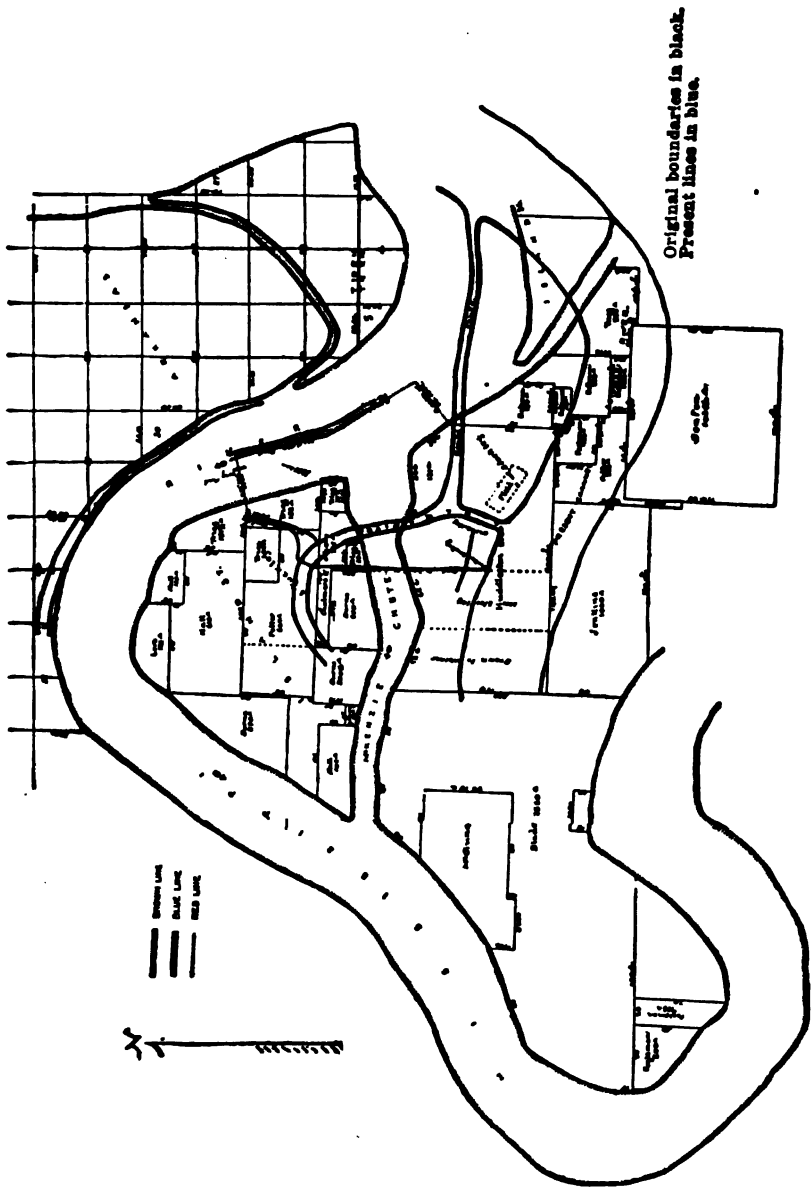
The old banks of the river, as well as the chutes, called "McKenzie Chute" and "Dean's Chute," are represented on this map by black lines, while the channel now occupied by the river is shown by the blue lines. The lands in controversy are embraced between the red lines. It appears from this map that about the year 1823 the Mississippi river flowed due south and on the east of Dean's Island, which was situated in Arkansas; that it then turned westwardly around Dean's Island, and then northerly, running between Dean's Island on the east and the Huddleston tract on the Tennessee main shore and Island 37 in Tennessee on the west; thence westwardly, around Island 37; thence southwestwardly, west of Island 37 and the Tennessee main shore; thence southwardly; thence eastwardly to within a mile and a half

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or two miles of the river east of Huddleston; thence turning southwardly, etc. The record discloses that the course of the river and the immediate vicinity of country remained substantially in this situation until March 7, 1876, when almost within a single night the river abandoned its original channel and excavated a new channel across the east part of the Huddleston tract, extending from northeast to southwest. It appears that about one thousand acres of the Huddleston tract and parts of other tracts belonging to adjacent proprietors were swept away as the result of the avulsion of the river. It is conceded that the new channel of the river lies wholly within the State of Tennessee. Centennial Island and Island 37 lie on the north side of the new channel, which runs between these islands and the main Tennessee shore. The record reveals that steamboats of light draught periodically ran through the old channel for two or three seasons after the cut-off, but this use of the old channel was finally abandoned, principally on account of the snags and drifts that had accumulated. It is shown from the proof that after a few years land began to appear above the water, and finally the two tracts of land which are now in controversy were fully disclosed, whether as the result of accretion, or emergence of land that had been temporarily submerged, it is not necessary now to inquire. In *Stockley v. Cissna*, 119 Fed., 812, 56 C. C. A., 324, the present complainant, W. H. Stockley, in an action of ejectment against the present defendant Cissna, asserted title to these lands

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Humphrey's Map.



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upon two contentions: First, as accretions to land owned by him and originally bounded by the Mississippi river; second, under a grant from the State of Tennessee for about one thousand acres thereof issued in 1901. Complainant failed to establish title to either tract of land, and as the result of that litigation his bill was dismissed. Complainant brings the present action in forcible entry and detainer to recover possession of the same lands. The first contention of complainant is that the lands in controversy are accretions to land owned by him on Island 37 and Centennial Island. Complainant makes an additional claim to the right of possession of the 131-acre tract upon the ground that the legal title to said land was originally vested in him, and that he lost possession thereof temporarily as the result of the avulsion of the Mississippi river. His claim now is that, said submerged lands having been restored by the reliction of the waters from the bed of the abandoned channel, his original ownership and right of possession have thereby been restored to him. It is not claimed by complainant, Stockley, that the lands in controversy were fenced or in cultivation by him at the time of the ouster by the defendant Cissna, but his insistence is that he is entitled to the possession of this land for two reasons: First, each of the two tracts now in litigation, one of 131 acres and the other of 1,050 acres, is part and parcel of another tract which Stockley had under fence and in cultivation, holding under muni-ments of title describing the whole property; second,

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the two tracts of land described in the bill are accretions to other tracts, situated on Island 37 and Centennial Island, which have been in possession of Stockley for many years. On the other hand, the contention of the defendant Cissna is that the land in controversy is, excepting possibly a small fraction, an accretion to Dean's Island. It is conceded that defendant Cissna is the owner of Dean's Island, on the Arkansas shore immediately opposite Centennial Island. In a word, his insistence is that the land in controversy belongs to him as an accretion to Dean's Island, which has been extended since the Centennial Cut-Off entirely across the river until it joins the Tennessee bank. The insistence on behalf of Cissna is that the lands in suit are wholly situated in the State of Arkansas. It is admitted that he does not claim any land situated in the State of Tennessee. This is a sufficient statement of the case to decide the question propounded in the plea of abatement, interposed on behalf of defendant Cissna, to the effect that the courts of Tennessee are without jurisdiction for the reason the subject-matter of the controversy lies wholly within the State of Arkansas. The first question suggested is whether the boundary between the two States was affected by the sudden and violent change in the channel of the river. The rule of law on this subject seems well established. In *Missouri v. Nebraska*, 196 U. S., 33, 25 Sup. Ct., 157 (49 L. Ed., 372), it appears, from the statement of the case by Mr. Justice Harlan, that:

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"Prior to July 5, 1867, the body and channel of the Missouri river were substantially as they had been continuously from the date of the admission of the respective States into the union, only such variations occurring during that entire period as naturally follow in the course of time from one side of the river to the other. But on the day named, July 5, 1867 (which was after the admission of Nebraska into the union), within twenty-four hours, and during a time of very high water, the river, which had for years passed around what is called 'McKissick's Island,' cut a new channel across and through the narrow neck of land at the west end of island precinct (of which McKissick's Island forms a part), about a half mile wide, making for itself a new channel, and passing through what was admittedly at that time territory of Nebraska. After that change the river ceased to run around McKissick's Island. In the course of a few years after the new channel was thus made the old channel dried up and became tillable land, valuable for agricultural purposes, whereby the old bed of the river was vacated about fifteen miles in length. This change in the bed or channel of the river became fixed and permanent; for at the commencement of this suit it was the same as it was immediately after the change that occurred on the 5th of July, 1867. The result was that the land between the channel of the river as it was prior to July 5, 1867, and the channel as it was after that date, and is now, was thrown on the east side of the Missouri river,

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whereas, prior to that date, it had been on the west side."

The fundamental question in the case was whether the sudden and permanent change in the course and channel of the river, occurring on the 5th day of July, 1867, worked a change in the boundary line between the two States. The syllabus of the case is as follows:

"(1) That accretion is the gradual accumulation by alluvial formation; and, where a boundary river changes its course gradually, the parties on either side hold by the same boundary line—the center of the channel. Avulsion is the sudden and rapid change in the course or channel of the boundary river. It does not work any change in the boundary, which remains as it was—in the center of the old channel, although no water may flow thereon. These principles apply alike, whether rivers be boundaries between private property or between States and nations.

"(2) The boundary line between Missouri and Nebraska in the vicinity of island precinct is the center line of the original channel of the Missouri river as it was before the avulsion of 1867, and in the center line of the channel since that time, although no water is now flowing through the original channel."

In *Nebraska v. Iowa*, 143 U. S., 359, 12 Sup. Ct., 396, 36 L. Ed., 186, it was held:

"When grants of land border on running water, and the banks are changed by the gradual process known as accretion, riparian owner's boundary line still remains

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the stream; but when the boundary stream suddenly abandons its old bed, and seeks a new course by the process known as 'avulsion,' the boundary remains as it was, in the center of the old channel. And this rule applies to a State, when a river forms all its boundary lines."

In that case Mr. Justice Brewer, after reviewing the cases, said:

"The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two States the varying center of the channel, and that avulsion would establish a fixed boundary, to wit, the center of the abandoned channel."

The opinion concluded as follows:

"It appears, however, from the testimony, that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but that of avulsion. By this selection of the new channel the boundary was not changed, and it remained as it was prior to the avulsion the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel."

In *Stockley v. Cissna*, 119 Fed., 812, 56 C. C. A., 324, Judge Lurton said:

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"The evidence in this case made it clear that, whatever may be said in respect to the formation of new land within the banks of the old channel, the new channel called 'Centennial Cut-Off' was an avulsion. This was the clear admission of both parties upon this question of fact before the court and jury below, and in consequence of which evidence was stopped, having no other purpose than to show the suddenness and violence of the change in the course of the river. As much as two thousand acres was carried away in the course of about sixty hours, upon which stood farm-houses, stables, cotton gins, warehouses, etc.; and so rapid was the washing away of farms through which the river ran as to make it in some cases impossible to remove household effects rapidly enough to avoid the caving banks."

Again in the course of his opinion Judge Lurton said:

"As another direct result, the old channel of the river so long the boundary between the two States of Tennessee and Arkansas was completely deserted by the river and in a short time became dry land. Thousands of acres of dry river bottom within the jurisdiction of Tennessee as lands lying on the west side of the main channel of the river were by this sudden formation of this new channel placed upon the east side of the Mississippi river, and the inhabitants of nearly an entire civil district of Tipton county, one of the counties of

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Tennessee lying on the Mississippi river, found themselves living on the east instead of the west side of the great river. But this sudden change in the channel of the river would not affect the titles to the lands thus transferred from one side of the river to the other, nor would it alter the boundary between the States. The middle of the main channel which the river abandoned was the boundary before the formation of the cut-off channel, and that line in the dry and abandoned bed of the river remains the line, unaffected by the new course of the river."

Judge Lurton further said:

"It is clear . . . that the lands in dispute are on the western side of the middle line of the channel of the old river, and therefore within the boundary of Tennessee, although now east of the present channel of the Mississippi river."

The facts stated by Judge Lurton as constituting the sudden and violent change in the channel of the Mississippi, and bringing it within the rule applicable to an avulsion, also appear in the present record; and the rule of law applied to the facts thus found is in conformity with the established doctrine of the supreme court of the United States on this subject. The boundary line, therefore, between the States of Arkansas and Tennessee at the *locus in quo* of this controversy, is the middle of the old abandoned bed of the Mississippi river as it existed at the time of the Centennial Cut-Off. But the exact location of this line has been the

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subject of much controversy at the bar upon the conflicting and unsatisfactory evidence presented in the record. This question, however, was the main issue presented in the case of *State of Tennessee v. Muncie Pulp Company and Others* (decided at the present term), *ante*, p. 47, 104 S. W., 437, wherein it was held by the court that the true boundary line between the States is the center of the channel of the Mississippi river as it flowed in the year 1823 and as the boundary line was then established. It is conceded that boundary line embraces all the land now in suit, and brings it within the jurisdiction of the State of Tennessee. The line of 1823 is shown on the map of J. H. Humphreys, surveyor, filed in this cause.

The next and determinative inquiry presented on the record is whether, at the date of the alleged ouster by the defendant Cissna, complainant, Stockley, was in peaceable possession of the lands in controversy. We will first consider in this connection complainant's right of possession to the 1,050-acre tract. Complainant claims this tract of land, first, as an accretion to the tract of land on Island 37 conveyed in 1869 by Robert I. Chester to Mrs. Martha P. Smith, and to complainant by sundry mesne conveyances, the last being from W. J. Caesar; second, under a grant from the State of Tennessee issued to complainant on the 26th of November, 1901. There is no proof that complainant was in the actual possession of this 1,050-acre-tract at the date of the alleged ouster, or that he had said land fenced

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or in cultivation. The claim of complainant is that this tract constitutes an accretion to other lands which the complainant owned and of which he was in actual possession at the date of the ouster, and that this accretion is embraced within the boundaries of his muniments of title. In *Stockley v. Cissna*, supra, wherein complainant sought to recover this tract of land in ejectment, Judge Lurton said:

“Before the plaintiff can recover the new-formed land on the margin of the solid land composing Island 37, he must be able to establish his ownership of the bank against which the accretion has formed. Until he does this he has no shadow of claim as riparian proprietor. The right to accretion depends upon the contiguity of the claimant’s estate to the river.”

The court held that, whether accretions or not, the plaintiff in error could not recover in an action of ejectment without showing either that he was a riparian proprietor against whose lands the *locus in quo* had formed, or that he held a legal title derived from some other source. It was held that the plaintiff had not shown title to such accretions by reason of riparian ownership, nor any title derived from any other source. The complainant, however, insists that, although his title to the main shore land failed in that action, he is nevertheless entitled to recover the possession of the accretions, because he was in possession of the main shore lands contiguous thereto. But a conclusive answer to this position is that the 1,050-acre tract

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in controversy was formed in the bed of the river as the result of an avulsion, and not as accreted land. We have already held that the *locus in quo* of the present controversy and the rights of the litigants must be determined by the law applicable to a technical avulsion, and not to the rule governing accretions. The claim of complainant is that, in view of the slow recession of the waters, he is entitled to the benefit of accretions that formed during that period. We think a complete answer to this position is found on the brief of Mr. Caruthers Ewing, in which he says:

"We believe that, as an avulsion does not change property lines or property rights, the effect of an avulsion does not, and it must be true that the recession of the waters from the old channel was the immediate and direct result of the cut-off or avulsion. We do not think there can be an avulsion which directly results in the abandoned channel of the river becoming gradually dry land, and that accretions could be made to the riparian owner's soil on the said abandoned channel. If an avulsion leaves property and boundary lines undisturbed, then the property and boundary lines remain exactly at the point at which they were when the avulsion took place. In Tennessee the riparian owner at the time of the avulsion had no title beyond low-water mark, and if the avulsion left that as the line we do not see how as a result of the avulsion the line can be projected further into the abandoned chan-

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nel, however slow the waters may have receded therefrom."

We think this an admirable statement of a sound reason why accretions cannot be claimed by a riparian proprietor as the result of an avulsion. It is conceded that the 1,050-acre tract of land was formed as the result of the Centennial Cut-Off. This land must be, therefore, either accretion or the result of an avulsion. There is no intermediate course. The fact that the old abandoned channel of the river did not immediately dry, but that a period of ten years or more elapsed before all the water was withdrawn and disappeared, would not render the cut-off any less an avulsion. This fact must be present whenever there is a change in the channel of a navigable river. It is impossible that there should be an instantaneous withdrawal of all the water in the channel; but after the avulsion has occurred there are accumulations of water which gradually and imperceptibly disappear.¹ The result of this holding is that, since complainant was not in actual possession of the 1,050-acre tract at the time of the ouster, constructive possession did not attach to said land by reason of complainant's actual possession of contiguous shore land.

The next contention of complainant is that he is entitled to recover the possession of the 1,050-acre tract by virtue of the grant issued to him by the State of Tennessee on the 26th of November, 1901, based on an

¹ This question is more fully discussed in *State of Tennessee v. Muncie Pulp Co.* (decided at present term), *ante*, p. 47, 104 S. W., 437.

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entry made in April of the same year. This grant was one of the muniments of title under which complainant claimed this land in the ejectment suit of *Stockley v. Cissna*, 119 Fed., 813, 56 C. C. A., 324. It is conceded that this grant covers by metes and bounds the 1,050-acre tract, but does not include the 131-acre tract on Centennial Island, although it bounds the latter parcel of land. The claim of plaintiff in that litigation was that, if he did not have the title to this land as a riparian owner, the title was in the State of Tennessee, which had been granted regularly and lawfully to him. It was held by the United States circuit court of appeals that:

“Under the well-settled law of Tennessee, the soil below low-water mark of the navigable rivers of that State, as well as the use of the stream for purposes of navigation, belongs to the public, and the title is vested in the State for the use of the public”—citing *Goodwin v. Thompson*, 15 Lea, 209, 54 Am. Rep., 410; *Elder v. Burrus*, 6 Humph., 358; *Martin v. Nance*, 3 Head, 649; *Stuart v. Clark's Lessee*, 2 Swan, 10, 58 Am. Dec., 49; *Posey v. James*, 7 Lea, 98.

“Under this rule of property, applicable to this case, the title of John Trigg extended only to low-water mark, and the title to the submerged land under the water and below low-water mark remained in the State for the use of the public. The land previously granted to Trigg, having been regained by accretion or otherwise, having again become dry land, was land regained,

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and was not subject to grant, as the State had parted with its title. *Curle v. Barrel*, 2 Sneed, 66.

"Plaintiff's grant is therefore void as to the land previously granted to John Trigg on the bank of Island 37, and can by no reasonable suggestion convey any land except that which lies between low-water mark of 1824 and the middle of the old channel of the river. This strip between the two lines mentioned was, prior to the flood of 1876, submerged land, and constituted the bed of the main channel of the Mississippi river. . . . If, then, the effect was that the bed of the old stream was suddenly deserted, so as to constitute a case of reliction, rather than the formation of land by the slow processes of accretion, the riparian owners would not profit; for the title to the land so suddenly become dry by the stream deserting its old bed would continue in the State in such jurisdictions as hold that the titles to the submerged bed of navigable streams is in the State in trust for the public. The court held that, under the Tennessee law providing for the granting and entering of vacant lands belonging to the State, this deserted river bed was not open for entry and grant, and that the grant of November 26, 1901, to the plaintiff by the State, was invalid. . . . The lands included in this grant were, at the time of the enactment of the law under which the grant was issued, plainly and clearly not within the terms of the law. They were not unoccupied, vacant lands within the meaning of the Tennessee act, as determined by the highest court of

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that State. They have since become dry land, capable of occupation, by a most extraordinary natural phenomenon—the sudden abandonment by a great river of its natural channel for a new and shorter one. The situation is one which could not have been reasonably contemplated by the lawmaker when providing for the ordinary vacant lands belonging to the public domain. The lands in question were not at the date of the act of 1847 within the meaning and purview of the makers of the law, because it was the policy and purpose of the State to reserve for the public use the beds of such navigable rivers. . . . The dry river bed is public property held by the State for public purposes, and some further legislation by the State is necessary before such property will become open to private ownership. There was no such state of evidence as would justify the court instructing the jury that the premises included in the grant below low-water mark of 1824 was an addition by accretion to the lands granted prior thereto and bounded by the river, or that the change which had occurred had been so sudden as not to be regarded as an accretion; but in either case the grant was ineffectual to give title to the plaintiff. There was, therefore, no error in the instruction to find against the plaintiff.”

This holding is, of course, conclusive between the parties to the present litigation, who were the real litigants in *Stockley v. Cissna*; but it is insisted on behalf of complainant that, notwithstanding the entry and

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grant of 1901 may be void, those muniments of title may be looked to as defining the boundaries of the 1,050-acre tract, and that, since complainant at the time of the ouster was in possession of a portion of the 1,050-acre tract, that possession will be extended to the limits of the boundaries defined in the entry and grant of 1901. The proposition is that possession of part of a tract of land under an instrument describing the whole is sufficient to maintain an action of forcible entry and detainer for that not actually in possession.

Counsel cites: *Rutherford v. Franklin*, 1 Swan, 322; *Brown v. Johnson*, 1 Humph., 262; *Mansfield v. Northcut*, 112 Tenn., 536, 80 S. W., 437.

In the case last cited it was held that constructive possession of a tract of land under a deed definitely describing its boundaries, connected with actual possession of part of the premises, is sufficient to authorize and maintain an action of unlawful entry and detainer. The court cited and approved *Davidson v. Phillips*, 9 Yerg., 93, 30 Am. Dec., 393; *Hopkins v. Calloway*, 3 Sneed, 11; *Phillips v. Simpson*, 2 Head, 430.

In *Mansfield v. Northcut*, supra, it appeared that plaintiffs in an action of unlawful entry and detainer had a deed to the land sought to be recovered definitely describing the boundaries, and claimed to the extent of the boundaries. There was a house on the land, occupied by defendant as tenant of plaintiffs, and the remainder was uninclosed mountain land. A claimant of the land under hostile title built a cabin upon a

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different part of the premises and induced the tenant to move into it and attorn to him. It was held that the landlord could not thus, by collusion between his tenant and an adverse claimant, be deprived of his possession, which was of the entire tract, sufficient to maintain his action of forcible entry and detainer. These principles are sound and well-recognized; but we do not find in this record any proof of the actual possession by complainant of any part of the 1,050-acre tract at the time of the ouster by the defendant Cissna. It is conceded by complainant, Stockley, that he had no house or improvements on any part of this tract, nor was he in possession of the same by a tenant. No part of said land was under fence or in a state of cultivation. The entire claim of Stockley to an actual possession is based upon the fact that from time to time he cut timber from this land and used it for the grazing of his stock. It is not even shown that this user was continuous and uninterrupted, and no such actual possession of any part of this land is shown as is contemplated by the law. The claim, therefore, of complainant to the possession of the 1,050-acre tract, must be denied, for all of the reasons stated.

We next proceed to a consideration of the claim of complainant to the right of possession of the 131-acre tract. This tract was also claimed as an accretion to shore lands claimed to be owned by complainant; but since we hold that the law of avulsion, and not the law of accretion, applies to the formation of the land

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in controversy, complainant's claim to this tract on this ground must also be denied. As held by the United States circuit court of appeals in *Stockley v. Cissna*, supra:

"This 131-acre parcel is not an accretion to the 305-acre tract acquired by Stockley by deed from Allen, inasmuch as it is a restoration of a part of the 1,500 acres conveyed by Huddleston to John Trigg, which was washed away as a first effect of the Centennial Cut-Off."

It appears from the record that this parcel of land, while owned by John Trigg, the second grantee in the deraignment of title, was suddenly swept away by the formation of the new channel in 1876, and that since that time this submerged land has again appeared above the water. It is shown that in the ejectment suit in the United States court plaintiff deraigned title to this tract of 131 acres down to John Trigg, who was in possession of the premises at the date of the avulsion in 1876. The federal court held that complainant had failed to show a divestiture of title to this land out of John Trigg, or otherwise how he had acquired the John Trigg title. But it does appear that John Trigg died about the year 1865, and devised this land to his son, W. W. Trigg, who remained in possession until his death, about the year 1871 or 1872. He left surviving him his wife, one son, and one daughter. It appears the widow and heirs were in possession until after the cut-off. It is shown that by the cut-off about one

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thousand acres of the land, including the 131-acre tract, was washed away. After the cut-off the remaining parts of these tracts which were not washed away were sold by decree of the chancery court for the payment of the debts of John Trigg. The firm of Sledge, McKay & Company bought these lands at the chancery sale and went into possession. This firm and their assigns and heirs remained in possession until they sold to T. H. Allen, who in the year 1888 conveyed the lands to complainant, Stockley, who has since that time been in possession; but, as found by the United States circuit court, the parcel of 131 acres which is claimed as an accretion is not included within the specific boundaries described, but is conveyed by Allen, if at all, by operation of the added words, "and accretions thereto." Hence, in the present investigation, the Allen deed may be entirely discarded, since complainant can assert no constructive possession of the 131-acre tract by virtue of that deed. It further appears that in March, 1897, the widow and heirs of W. W. Trigg conveyed their interest in the tract, including the part that had been washed away, to the complainant, Stockley. This deed includes in its description the 131-acre tract in controversy. It is shown in the present record that the parties who joined in that conveyance were wife and heirs at law of W. W. Trigg, deceased. It is not shown that complainant had, at the date of the alleged ouster or at any time, had possession of any part of the 131-acre tract, other than that constructive possession which re-

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sults from his possession of other parts of the land included in the deed just mentioned. The deed from the widow and heirs of W. W. Trigg is merely in the nature of a quitclaim deed. Complainant again invokes the rule that possession of part of a tract under an instrument describing the boundaries of the tract is in law the possession of the whole tract. *Rutherford v. Franklin*, 1 Swan, 322; *Brown v. Johnson*, 1 Humph., 262; *Mansfield v. Northcut*, 112 Tenn., 536, 80 S. W., 437.

It was held by the federal court that complainant's deraignment of title from John Trigg failed, and the infirmity in the deraignment was based upon the fact that there was no evidence of either the death of W. W. Trigg or that the grantors were in fact his widow and heirs. As already stated, this defect of evidence has been supplied in the present record. We are of opinion, therefore, that complainant in the present cause has shown a possessory right to the 131-acre tract, since in 1897 he went into possession of more than four hundred acres of the Trigg tract under the deed from W. W. Trigg and others, which in its description included the 131-acre tract. He was, therefore, in constructive possession of the latter tract in 1901, when the defendant Cissna went upon the land and built a fence across it, thus ousting complainant of his possession. It has been suggested, however, that the 131-acre tract was washed away and disappeared at the time of the Centennial Cut-Off. It is true that one thousand acres of the Trigg land, which included the 131 acres, was swept

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away by the avulsion of 1876; but this fact does not extinguish the owner's title to said land, for, when it reappeared above the water, there was a restoration of the title and right of possession. On this subject, in the case of *Stockley v. Cissna*, supra, Judge Lurton said:

"As a consequence of the changed course of the river in 1876, the submerged Trigg lands have been restored, through accretion or some other process, and are now dry land. It cannot be contended that, because the surface of this land was washed off, Trigg lost his title to said land so submerged, beyond recovery. The law is otherwise. Land lost by erosion or submergence is regained to the original owner, when by reliction or accretion the water disappears and the land emerges."

In *Mulry v. Norton*, 100 N. Y., 426, 3 N. E., 581, 53 Am. Rep., 206, it appeared that a beach had been washed away and was afterwards restored. In the midst of its opinion the court said:

"It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner or enables another to acquire it; for the erosion must be accompanied by a transportation of the land beyond the owner's boundaries to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property to be established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon

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which the ownership temporarily lost will be regained. When portions of the main land have been greatly encroached upon by the ocean, so that navigable channels have been extended therefrom, the people by their sovereignty over public highways undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owner." Angell, Tide Waters, 76, 77; Houck's Rivers, 258.

"Neither does the lapse of time, during which the submergence continues, bar the right of such owner to enter upon the land and reclaim and assert his proprietorship." Angell, Tide Waters, 77-80, and cases cited; *Ocean City Ass'n v. Shriver*, 64 N. J. Law, 550, 46 Atl., 690, 51 L. R. A., 425; *St. Louis v. Rutz*, 138 U. S., 249, 11 Sup. Ct., 337, 34 L. Ed., 941; *Gale v. Kinzie*, 80 Ill., 132; *Minton v. Steel*, 125 Mo., 181, 28 S. W., 746; *Hughes v. Birney*, 107 La., 664, 32 South., 30.

It was held in the federal court case of *Stockley v. Cissna* that the heirs of John Trigg, or those to whom he conveyed, are the beneficiaries of the restoration. It thus appears that Stockley's vendors did not lose their title to the site of the land washed away by the Cen-

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ennial Cut-Off, but their original boundaries had always been preserved to them; and, when this land was built up by the deposits of the river sediment, they may again assert title and right of possession. For the reasons stated, we are of opinion that, as against defendant Cissna and the other defendants, the complainant is entitled to recover the possession of the 131-acre tract described in the bill; but he is not entitled to any relief as to the 1,050-acre tract.

The cost of the appeal will be divided between the parties.

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LEE HOLDER v. STATE.*

(Jackson. Special September Term, 1907.)

1. **CIRCUMSTANTIAL EVIDENCE.** Sufficient to sustain conviction of murder in the first degree.

Circumstantial evidence stated, considered, and held sufficient to exclude every hypothesis but that of guilt, and to sustain a conviction of murder in the first degree. (*Post*, pp. 181-209.)

2. **CRIMINAL LAW.** Motive need not be proved when guilt is clear; motives remove doubts and strengthen the case when necessary.

If the proof of guilt be clear, it is not necessary to prove a motive, in the ordinary meaning of that term. If a homicide is committed through the promptings of a wicked and depraved heart, it is not essential that the State should prove grudge, or quarrel, or incitement of cupidity, or jealousy, or other special thing that proximately aroused the lethal purpose. Proof of motive strengthens the State's case when strength is needed, and tends to dissipate doubts when doubts have been engendered. (*Post*, pp. 199, 200.)

3. **ALIBI.** Evidence insufficient to sustain.

Evidence stated, considered, and held insufficient to establish an alibi, because inherently inconsistent, contradictory, and incredible, and overwhelmed by the testimony of the guilt of the accused. (*Post*, pp. 203-209.)

4. **EVIDENCE.** Recognition of a certain horse by the sound of his feet in a lope; nonexpert testimony as to identity.

A nonexpert witness may give his opinion as to the identity of things; and a witness who testifies in a criminal case, that he

*As to admissibility in criminal case of evidence of other crime, see note to *People v. Molineux* (N. Y.), 62 L. R. A., 193.

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is familiar with the sound of a certain horse's feet when going in a lope over a bridge near his home, from having often seen and heard that horse lope over the bridge, may testify as to his recognition of the horse from the identity of the footsteps he heard with those of the horse in question. (*Post*, pp. 209, 210.)

Case cited and approved: *Railroad v. Hunton*, 114 Tenn., 609.

5. **SAME.** Of previous attempts to kill is admissible to show the intent.

In a prosecution for a patricide, evidence tending to show previous attempts by the accused on the life of the deceased and other members of the family is admissible and relevant for the purpose of exhibiting the animus or state of mind of the accused towards the deceased, as indicating hostility or settled purpose to harm or injure the deceased. The said evidence being competent to show the intent, it is not incompetent on the ground that it tends to show the commission of a distinct and independent crime. (*Post*, pp. 210-217.)

Case cited and approved: *Williams v. State*, 8 Humph., 585, 593, et seq.

6. **SAME.** Witness impeached by expression of opinion implying statement of fact clearly in conflict with his testimony.

A witness may be impeached by proof of an expression made by him in the form of an opinion implying the statement of a fact clearly in conflict with his testimony; as, where, in a prosecution for a patricide, the mother of the accused testified in his behalf in support of an alibi, and, in answer to a proper question laying grounds for an impeachment, denied that shortly after the killing, in a conversation with certain parties at a certain place and time, she asked if it could be possible that she had raised a boy that would kill his father, and, in response to a suggestion that perhaps he did not, replied that she would have to admit that he did it, the State was entitled to contradict

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and impeach her testimony in support of the alibi by proving in rebuttal that she in fact expressed such opinion. (*Post*, pp. 217-228.)

Cases cited and approved: *Scott v. State* (Tex. Cr. App.), 93 S. W., 112; *Watson v. State* (Tex. Cr. App.), 95 S. W., 115, 116; *Barbee v. State* (Tex. Cr. App.), 97 S. W., 1058; *State v. Kingsbury*, 58 Me., 238; *Commonwealth v. Wood*, 111 Mass., 411; *Mayer v. People*, 80 N. Y., 377; *State v. Baldwin*, 36 Kan., 14; *Schell v. Plumb*, 55 N. Y., 599.

Cases cited and distinguished: *Saunders v. Railroad*, 99 Tenn., 130; *Franklin v. Commonwealth*, 105 Ky., 237.

7. **BILLS OF EXCEPTIONS.** Court's charge and refusal of continuance cannot be reviewed when not embraced therein.

Where the bill of exceptions does not include the charge of the court nor the affidavit for a continuance, errors assigned upon the charge and for the trial court's refusal to grant a continuance cannot be considered or reviewed on a writ of error. (*Post*, p. 228.)

FROM OBION.

Writ of error to the Circuit Court of Obion County.—
JOSEPH E. JONES, Judge.

RICE A. PIERCE and JOSEPH L. FRY, for Holder.

ATTORNEY-GENERAL CATES, for State.

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MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted in the circuit court of Obion county for the murder of his father, Rev. B. L. Holder, and was convicted and sentenced to be hanged. Against this judgment he has sued out a writ of error in this court, and has prayed that the sentence be reviewed.

The errors assigned are upon certain rulings of the circuit court in the admission of testimony and upon the sufficiency of the evidence to sustain the verdict. Passing for the present the first class of questions, we shall proceed at once to the case made by the evidence.

About ten o'clock on the night of December 27, 1906, Warren Brown, a colored man, returning to his home from the town of Troy, in Obion county, saw, on the public road leading from Troy eastward to Rives in the same county, a horse and buggy, down in a depression on the south side of the road at the west end of a bridge, about one mile east of Troy; the buggy overturned and the horse entangled in the harness. He at once proceeded to the homes of two men nearby, Luther Lancaster and A. A. Everton, and reported his discovery. Mr. Everton and Charles Lancaster, the son of Luther Lancaster, accompanied Brown back to the bridge, and a more particular investigation was then made; but nothing further was ascertained, except that a laprobe was found under the overturned buggy, and that the horse was probably that of Rev. B. L. Holder. The horse was extricated from the harness, and was

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then ridden by Charles Lancaster to the home of Mr. Holder. His wife and children were aroused, and they at once identified the horse as the property of the husband and father. All of them, as soon as they could put on their clothing, returned with Charles Lancaster to the scene of the disaster, which was only about 1,100 yards from their house, and on the same road on which they lived. On the way they were joined by some of the neighbors, and soon quite a crowd of people gathered in, some from Troy; the news having been quickly disseminated by telephone.

It appeared that on that afternoon, shortly before six o'clock, Rev. B. L. Holder had left his home to go to Troy, something more than a mile distant, to attend a Masonic meeting. He did not reach Troy, and did not return home. His horse and buggy were found in the predicament above mentioned at ten o'clock that night, and the family and the neighbors began their search for him. The night was cloudy, and it was raining a little; but the darkness was somewhat relieved by the moon, which now and then shone through the clouds. The searchers had lanterns, and they explored the sides of the road between the fences, on each side, and to some extent the fields to the north and south, but not thoroughly, and nothing was discovered. About daylight, however, one of the party saw, about sixty yards away, within the south field, an object which, at that distance and in that light, presented to some the appearance of a low stump; but, as it was known there

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were no stumps in that field, it was at once conjectured to be the body of Mr. Holder. Mrs. Holder, indeed, said she could discern the overcoat which he wore when he left home the night before. All went over into the field, and it was soon placed beyond doubt that it was indeed the body of the missing man.

On an inspection of the body, made soon after, it was discovered that there was a gunshot wound in the right side of the abdomen, close to the waistband of the trousers, from which the bowels were protruding. There was another gunshot wound just under the heart; in each of these wounds the orifice being about the size of a silver dollar. One of the cheek bones was crushed in. The back half, or portion, of the head was crushed, so that it felt like a soft-shelled egg. There was a gash on the left side of the head through which the brains were visible. There were in all three gashes on the outside of the head. There was a slight imprint or indentation in the ground where it appeared, or seemed, his head had lain, and above the top of his head there was a hole in the ground that presented the appearance of the hole made where a stick has been stuck in the ground; and there were hair and blood all around the place. There was a considerable quantity of clotted blood on the ground, and for four or five feet around the ground was tramped, as if there had been a struggle.

Further examination disclosed that the deceased had on only one overshoe. The other overshoe was found

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sticking in the mud in the edge of the branch near the overturned buggy. From this point the tracks of the deceased, plainly indicated by the track of an overshoe on one foot and the imprint of the shoe on the other foot without an overshoe, were followed to the fence, thence into the field, and through the field up to the point where his body was found. It was also discovered that there was another line of tracks running parallel with those of deceased, and that they closed in with the tracks of the deceased at the point where the body was found. The person who made this second line of tracks had crossed the fence several feet to the east of the point where deceased crossed it. Both lines of tracks showed that the men who made them were running. Both lines of tracks ran almost due south from the bridge until they neared a thicket in the field. Then the tracks of the deceased turned eastward, and presented the appearance of unsteadiness and uncertainty. At this point the tracks of the other party closed in, and intercepted those of deceased before the latter had covered more than a few feet going eastward; and here the body lay.

At the east end of the bridge there was found lying in the road an empty shell, and at the west end of the bridge another empty shell. Each of these was a No. 12 of the kind known as "New Chief," manufactured by the Western Cartridge Company for shotguns. These shells were of the size to fit a single-barreled shotgun which was owned by the deceased, and when that gun

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was subsequently found there was a shell in it of the same kind.

The deceased was killed on Thursday night, December 27th. The body was discovered the next morning, Friday, the 28th, and on that day the inquest was held. After the inquest was over, the body was removed to the family home and prepared by the neighbors for interment. One of those assisting in the performance of this funeral rite was the witness W. A. Muse. After the body had been prepared, Mr. Muse suggested that a search be made for the gun. It should be here interposed that Mr. Holder, the deceased, had on the 15th of December purchased a single-barreled, breech-loading shotgun from Mr. Rochelle, a hardware merchant of Troy. He was accustomed to keep this gun in his bedroom, lying between the mattress and the cover of a bed in that room. The whole family knew where he kept it. On the afternoon of the day immediately preceding the night he was killed—that is, in the late afternoon of Thursday, December 27, 1906—Mr. Holder went out upon his farm to look for some calves and took his shotgun with him, to hunt along the way. About supper time he returned, bringing the gun with him. His wife saw him take it into the house. She did not observe where he deposited it. It does not appear that any member of the family ever saw this gun after that time until its discovery by the witness Muse, after Mr. Holder's death, unless it was seen and used by the plaintiff in error, Lee Holder. Mrs. Holder says she never

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saw it again. Plaintiff in error testifies that he saw his father go off with it in the afternoon when he went to look for the calves, and that he saw him when he returned at supper time, but that it was so dark he does not know whether he brought the gun back or not. The only other member of the family who testified, Earl Holder, a boy of fourteen or fifteen years old, says practically nothing upon the subject. There were only two other members of the family at home—Nona, a girl of ten and Cecil, a boy of eight. They were not introduced.

Resuming the history of the search for the gun: After Mr. Holder's body had been prepared for burial, Mr. Muse, joined by some other persons, went forth to find the gun. They were searching the barn. When they were within three feet of the place where the gun was subsequently found, the plaintiff in error came near and looked at them with an expression on his face evincing so much anger that Mr. Muse was frightened, and for fear plaintiff in error would do him harm he immediately ceased the search and went to the house. The next day, Saturday, after plaintiff in error had been placed under arrest, the search was renewed, and about twelve o'clock the gun was found. There was a hole in the east end of the barn, right at the ground. The barn was weather-boarded down to the ground; but there was a hole at the end that ran under the building, concealed from the outside in front by the planks. Into this hole the gun had been thrust, and

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behind it, so placed as to conceal it, there was pushed in a 2 by 4 inch scantling. So covered up and hidden, the gun could not be seen from the front of the building, or from the end; but by going around on the other side of the barn, and peering under, the discovery was made.

When the gun was drawn from its place of concealment, it was found to be in the following condition: The stock was broken off, the barrel was bent in two different directions. It was rusty, and it had mud, or mud and hair, upon it, and there was blood on the end of it. It was a single-barreled, breech-loading shotgun of the make of Norvell Shapleigh Hardware Company. It was thoroughly identified as the gun of Rev. B. L. Holder by the witness Ed Turnage, who was present when Mr. Rochelle sold it to Mr. Holder. Mr. Rochelle testified to the sale of a gun of the make above mentioned to Mr. Holder on the 15th of December, and Mr. Turnage, who was present when the sale was made, identified the particular gun by a knot on the left side of the stock.

On the day immediately preceding the night on which the homicide was committed—that is, on December 27, 1906—the plaintiff in error purchased of Ed Turnage, clerk of Mr. Rochelle, a hardware merchant of Troy, a box containing 25 New Chief shotgun cartridges of size No. 12, the proper size to fit his father's gun, as already stated, and the same kind found near the bridge. Mr. Turnage does not remember the time of the day when this purchase was made, whether

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morning or afternoon. The witness W. E. Huey, however, says that on the afternoon of the 27th of December, at 4:30 o'clock, he met plaintiff in error riding rapidly into Troy. He says he met him at the Troy roller mill, which is 250 yards from the main part of the town; that he had crossed the railroad and was going into town. Probably this was the time when he bought the box of cartridges; but, whether this be true or not, it is certain that he bought the cartridges that day. Plaintiff in error does not explain this circumstance; indeed, he does not refer to it at all in his testimony, either by way of affirmance or denial, further than his denial that he was in Troy that afternoon may be construed into a denial of this purchase. In fact, while the people were searching for his father's body, the night of the homicide, he spoke doubtfully as to whether his father owned a gun. He said to the witness Muse that his father had bought a gun from Rochelle at Troy, but that he might have carried it back; that he did not know what he had done with it. This statement was made in the face of the fact that he saw his father with this gun late Saturday afternoon when he went to look for the calves, just before supper, and he saw his father when he started for Troy that night, and knew he did not take the gun with him. The plaintiff in error does not deny that he made the foregoing statement to the witness Muse.

The plaintiff in error admits that he knew on Friday, the next day after the homicide, that he was suspected

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of the murder of his father. On that day, about twelve o'clock, he took off the shoes that he had worn the day before, and put them in a side room, not the room that he usually occupied. He says that when he changed his shoes he did not then know that he was under suspicion. However, the shoes were changed. These shoes were called for by the witness Andrew Harrison, and handed to him by Earl Holder, the young brother of the plaintiff in error. They are thoroughly identified as the shoes which the plaintiff in error wore on the 27th of December, and on the morning of the 28th, when the people were searching for the body. These facts are practically admitted in the plaintiff in error's testimony, and that these were the same shoes he wore while the search for the body was proceeding was substantially proven by other witnesses.

These shoes were peculiar, in that the left one was run down on the inside. After the body of the deceased was found, and while the people were still in the field where it lay, the attention of several of the party was drawn to the similarity of the tracks then made by the plaintiff in error to those made by the assailant of the deceased, and two or more of the party marked the plaintiff in error's tracks, those he made that morning, by sticking little sticks in them for future examination and comparison. The tracks of the assailant, as we have already said, paralleled those of the deceased until they come together at the point where the deceased fell. From this point the tracks

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of the assailant were plainly traceable as they led out of the field to the fence, which he got over at a point twenty or thirty feet east of where he entered. These tracks made by the assailant were compared with those which were made by the plaintiff in error in the field on Friday morning (the ground being soft both Thursday night and Friday morning), and were found to be in all respects similar. When the shoes were procured, they were placed in the tracks of the assailant and found to correspond accurately, except in a few instances, where people had stepped near the assailant's tracks and had forced the mud into the latter, thus squeezing the sides together. The correspondence was particularly noticeable when the run-down left shoe was put into the assailant's track. The comparison was perfect.

The demeanor, conduct, and conversation of the plaintiff in error during the search for his father's body, then in the presence of the body after it was found, subsequently at the inquest, later at the time of his arrest, and lastly when he was under arrest, were all unnatural and eminently challenge attention.

F. C. Watkins testified that on the night of the homicide, when the people were searching for the body, plaintiff in error "didn't seem to have much to say, didn't seem that anything bothered him." He exhibited no anxiety. "He was laughing and talking with the boys." He smoked a cigarette that night. Carried a Winchester rifle all night. (This gun was borrowed from a

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neighbor, at the request of plaintiff in error, when the search began.) This witness asked him "if there were no tracks leaving the fence, and the defendant said, 'Yes, there were two tracks leaving the fence, but they don't go but a short piece before they come back.'" To a suggestion that bloodhounds should be procured, the plaintiff in error replied they would do no good, because it had rained. Mr. Muse testified that the next morning the matter of procuring the bloodhounds was again suggested, and in reply plaintiff in error said "he had rather not have them, as they might get an innocent party." That morning, when the body was discovered, the searching party was composed of the family of the deceased, Luther Taylor, W. A. Muse, John Powell, Luther Lancaster, and Mrs. Luther Lancaster. All went over to the body, but the plaintiff in error lagged behind. Mrs. Lancaster says: "He was right around there somewhere, but I could not tell you right where he was. He was not with me and Mrs. Holder." Luther Taylor says, as they got over the fence and went into the field, plaintiff in error "was following on behind, about fifteen or twenty feet," and that when they reached the body he was not with the family, but "was standing off behind," and that he was "smoking a cigarette"; that he was smoking when he came down to the bridge. This was evidently his first attitude, since it is said by Mrs. Lancaster later in her testimony that she saw him near the body. Likewise Mr. Muse states that he saw him there, near the body. The witness then testified:

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"Q. Tell the jury when he came up there what was his appearance, conduct, demeanor, and actions. A. I never saw him do anything. He seemed to be uneasy. I believe he did smoke a cigarette. Q. Do you mean by a cigarette one of those bought cigarettes? A. No, sir; one that he made. Q. Did he make it there? A. Yes, sir."

Plaintiff in error accompanied his mother to the house of a neighbor, after she had seen the body, and he then returned. Of his demeanor and appearance at this time the witness Watkins says: "Q. Was he close to the body of his father? A. He came right up just behind the men that were standing there. Q. Was he in sight of the body? A. Yes, sir. Q. Tell the jury what his actions and demeanor were there. A. He walked up by the men. He could see his father lying there in the field. His eyes glanced around. Q. You say he looked at his father? A. Yes, sir; he looked at his father with as—well, I don't know how to express it, but he looked as though he was fierce and mad. He looked at him like he might have been looking at something he was mad at. Q. What was the expression on his face? A. That of being mad."

Another witness, Mr. McDade, says he saw plaintiff in error that morning out at the scene of the murder where the body was lying, and that he "was looking on as a casual observer." Andrew Harrison, who came up after they had moved the body near to the road for the inquest, says he there saw the plaintiff in error standing

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within thirty-five or forty feet of his father's body rolling a cigarette. The witness, T. J. Easterwood, says that "he seemed to be standing around looking on as other people were." Numerous witnesses testify that he did not shed a tear or show any sign of grief. The plaintiff in error admitted in his testimony that he shed no tears over his father's death, and said by way of explanation or palliation: "I can't cry; I haven't cried, I reckon, in ten years." He was then questioned, and answered as follows: "Q. Did you or not feel acutely the death of your father? A. Certainly, I was grieved over it. Q. They have been talking about your smoking a cigarette. Why did you smoke? A. I was smoking to quiet my nerves. I always smoke when I am bothered about anything." These were questions propounded by his own counsel. The witness Muse says that when the plaintiff in error saw his mother crying he went to her and she stopped; that he saw this occur twice. He slept in the same room where the corpse of his father was laid out Friday night, and slept soundly the night through. When he was about to be placed under arrest on Saturday morning, December 29th, as the officer was proceeding to read the warrant to him, he said: "Let me have the damned thing. I can read it." The plaintiff in error admits this. Another thing that happened at the same time is thus stated by the witness G. R. McDade: "I heard him ask a young man standing by him for a match. As to what he did, he stood there without bat-

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ting an eye or moving a muscle, rolled a cigarette, and lit it." After he had been placed under arrest, and when he was on the way to jail, he said to the officer who had arrested him that if he had been armed, or had a pistol, when he was arrested, he would have "swapped it out" with him.

The murder was committed just at 6 o'clock on the evening of December 27, 1906. Mr. Lancaster, who lived nearest the scene of the tragedy, was sitting in his back yard stirring a kettle of lard which he was rendering. Mrs. Lancaster was at the supper table. She says: "We heard one, then in a little while two more shots, and the whistle blew"—the 6 o'clock whistle of a mill at Troy. Just after the first shot they heard some one shout: "Help! help! murder! murder!" Mr. Lancaster says: "Then I could hear a noise like this: 'Oh! oh! oh! o-o-o-o-oh!'" There was a greater interval between the second and third shots than between the first and second. The witness Sam Moffitt, who lived close to the roadside, says that before 6 o'clock he heard a buggy pass going towards Troy; next he heard going by in the same direction a horse in a lope, going, as he says, "tolerable fast"; then he heard a second buggy going in the same direction the horse had gone, westward towards Troy. He heard no other passing in that direction. After the man on horseback had passed, and after the second buggy had passed, he heard three shots in the direction of the bridge where the overturned buggy and entangled horse of the deceased were subsequent-

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ly found. The next thing he heard, a few minutes after the firing of the shots, was a horse loping back in the opposite direction; that is, eastward, in the direction in which the home of the deceased lay. The horse was going faster than before. The witness testified that the footstep of this loping horse sounded like those of Mr. Holder's big mare; that he was familiar with the sound of her hoof-beat when going in a lope across a bridge twenty-five or thirty yards from his house; that he had seen plaintiff in error ride by his house on this animal; and that he was accustomed to ride in a lope. Mr. Lancaster also testifies to having heard a horse going back eastward shortly after the sound of the shots was heard, and he says the animal was going "pretty fast." It was too dark at that time of the year, at 6 o'clock, for either of these witnesses to have identified the rider, nor do they claim to have looked. Mr. Lancaster was rendering lard in his back yard, as already stated, and Sam Moffitt was in the kitchen seasoning sausage meat. They merely heard the sounds as above related.

With these facts before us, and one or two others now to be stated, the story of the crime can be put together without error in any substantial detail.

There was to be a public installation of the officers of the Masonic lodge in Troy that night, and plaintiff in error knew that his father was going. The matter had been discussed in the family. Mr. Holder invited his wife to go with him, but she would not go and leave her little daughter Nona at home with the boys (so she

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testified), and the road was so heavy that Mr. Holder would not consent to have both of them in the buggy. He then invited his son, the plaintiff in error, to go with him; but he declined on the ground that he wished to go to sleep that night. Knowing his father was going to Troy that night, he went into town late in the afternoon, at the time the witness Huey saw him, and purchased the box of cartridges. Shortly before, or about the time, his father left, he caught one of the horses and preceded him to the bridge, and there waylaid him in the darkness. The first shot was fired at the east end of the bridge, where the first shell was found. This one missed, but frightened the horse, so that he ran and turned the buggy over at the west end of the bridge, and threw Mr. Holder out. Here the second shot was fired, where the second shell was found, and was delivered at close range, as shown by the size of the hole and by the condition of the clothing of deceased. This was perhaps the shot that took effect in the side, as he probably could not have crossed the fence and run sixty feet after the shot in the breast near the heart. After the second shot, the deceased crossed the fence into the field and ran to save his life, pursued by the plaintiff in error, and the third shot was delivered at the point where he fell in the field. The plaintiff in error then clubbed him, first with the stock of the gun, and, after that was broken, then with the barrel, until it was bent into the shape in which it was found. He then dug into his victim's head with the muzzle of the gun, until the scalp

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was scarred and the brain exposed in the manner above detailed. The cries of "Help! help! murder! murder!" were probably made at the bridge when the first shot was fired. The cries of "Oh! oh! oh! o-o-o-o-oh!" were probably made after the last shot was fired and when the clubbing began. After the plaintiff in error had completed this murder of his father, he hastened from the field, mounted the horse he had ridden to the scene, rode rapidly home, only a few hundred yards distant, turned the horse loose, and hid the gun under the barn, then went to the house, and acted as if nothing had happened.

The foregoing conclusions are only inferences from the facts contained in the record, and stated above; but they seem to us, in their substantial purport, necessary and inevitable inferences. The cartridges which the plaintiff in error purchased fit the gun of the deceased with scarcely more accuracy than did his shoes fit the tracks of the undoubted assailant of the deceased. Who but the plaintiff in error could have procured the gun of the deceased from his home and hid it under the barn after it had been used? Not his mother; not the young boy, Earl; not the two small children, Nona and Cecil. There was no one else to do it. There is no intimation in the record that any stranger had any opportunity to get hold of the gun. Why did the plaintiff in error grow angry when he saw the searchers for the gun close to the place where it was hid, and frighten them away with the terror-striking aspect of his visage, if he did

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not know that the gun was hidden there? Why did he falsely seek to create the impression, when they were searching for his father's body, that his father owned no gun at the time, but had probably disposed of it by carrying it back to the seller, unless he was prompted by the knowledge of his own fatal connection with that gun and was gropingly warding off suspicion? Why did he change his shoes, but for fear that a comparison of them with the tracks made by the murderer would lead to the conclusion that he himself was the murderer? Why did he brush aside the suggestion for the procurement of bloodhounds, first on the ground that they could be of no service because it had rained, and next on the ground that they might track an innocent person, unless there was couched in his heart a fear that they might track him? Why did he seek to mislead the searchers for the body, on Thursday night, when asked if there were no tracks that led into the field, by saying that there were two tracks, but they went only a little way into the field, then came right out again? The reply showed that he knew the existence of the tracks and there was no evidence that the two tracks came out again. Why the false answer, unless there was a purpose to turn aside the course of a dangerous investigation? Was there ever a son, who loved his father, or who respected him even, or who had within his heart the sympathy for his kind belonging to our common humanity—was there ever such an one who sought for the body of his missing father in the spirit of levity manifested by the present plain-

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tiff in error? Did such a one ever so approach the body of that murdered parent as the plaintiff in error did, with halting and lagging steps? Did such a one ever look upon the face of his father, broken in and mutilated, his head crushed and his body pierced by gaping wounds, without a tear, without any sign whatever of grief, but, on the contrary, with alternate indifference and malevolence? What did the plaintiff in error's words mean when he was arrested? "Hand me the damned thing. I can read it." Was it to show that he was not alarmed? Do we hear one word of expostulation, any exclamation of surprise, any expression of horror, that he should be charged with so awful a crime as parricide, any natural outburst of human emotion? None! Only cold, impassive profanity, and sullen bravado. And when he had been placed under arrest, and was on his way to jail, do we still hear any expression of grief, or regret, or claim of innocence? None; only a boast that, if he had been armed, he would have resisted arrest.

In view of all these facts, can there be any doubt of the plaintiff in error's guilt? We think there cannot be, and we are of the opinion that the jury were justified in finding that, although the evidence against the plaintiff in error was wholly circumstantial, no hypothesis could be entertained under it other than his guilt.

It is insisted that no motive is shown. If the proof of guilt be clear, it is not necessary that there should be proven a motive, in the ordinary meaning of that term.

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If one man kill another through the promptings of a wicked and depraved heart, it is not essential that the State should prove some grudge, or quarrel, or incitement of cupidity, or jealousy, or other special thing that proximately aroused the lethal purpose, although it be true that, when such things are proven, they add strength to the State's case when strength is needed, and tend to dissipate doubts when doubts have been engendered. But in the present case certain facts are proven which go far to explain the plaintiff in error's motive. At the age of fourteen the plaintiff in error gave evidence of an unruly and insubordinate disposition, and an impatience of parental control. At that age, without permission of his parents and without their knowledge, he left home and went to New Orleans. There he stayed three months and worked in a restaurant. He then returned home. Some time after he returned his father told him he either had to go to school "or get out away from him, one of the two." He then left home and went to the home of a neighbor, one Brack Stovall, and remained there a week. Afterwards, when he was sixteen years old, he again left home without his father's knowledge or consent, this time going to Los Angeles, Cal. Before he left he quit school, because, as he says in his testimony, he did not like the teacher. He says his father wished him to go to school. On this trip he remained away ten months. He says his purpose was to see the country; probably, also, to be with his brother Adolphus, who was there. From Los Angeles he went to Dallas,

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Tex.; thence to Shreveport, La.; and from the latter city returned home. His mother testified that he has not left home on a trip since the time just mentioned, but that about a year before the murder his father whipped him with a pair of bridle reins because he took his (the father's) team and conveyed some boys to a baseball game at Union City. His mother testifies: "He has never been away from home since then." Plaintiff in error testified that the day before the murder, his father went to Union City to make arrangements for money to send him off to school, and that he was getting ready to go off to school. Several witnesses, persons not members of the family, and who visited the house only occasionally, testify that the relations between the father and son were pleasant. Plaintiff in error also says their relations were kindly; but this we do not credit. Mrs. Holder says that her husband was kind to the plaintiff in error; but, when he did anything his father did not wish him to do, "he would talk to him about it, and he never talked back or jawed back at him." The witness G. L. Williams, who worked on the farm a few months prior to the murder, says that Mr. Holder was a rough-speaking man; that he always spoke to him (Williams) roughly. He mentions an occurrence that took place out in the woods where plaintiff in error and his brother Adolphus were cutting wood. He states that he (Williams) went down to the place where the wood was being cut, and plaintiff in error was leaning on his ax, or had his ax in his hand, and that as he (Wil-

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liams) came up, plaintiff in error said, referring to his father, he had just been "raring on Dolphus." From all this we infer the case of a restive, unruly boy and a stern father, who tried to do his duty by his son, but who corrected the son's derelictions with harsh speech and harsher corporal punishment.

We can well believe that under such circumstances there was not much tender love between the parent and child—on the one hand a severe, exacting father; on the other, a restless, insubordinate, and rebellious son, always inwardly chafing against the restraints imposed on him. It was perfectly natural, too, that the wild disposition which led him to abandon his father's home at the early age of fourteen and of sixteen, and the consequent reliance during these absences upon his own will and wishes, and the opportunity of giving rein to his own unchecked impulses and passions, would add to his impatience of authority and intensify the spirit of lawlessness within him. We can easily conceive how such a boy would resent, when seventeen years old, a castigation with a pair of bridle reins, and that the memory of it would rankle in his heart. We have seen that his father had trouble with him on the subject of going to school, so much so that he had presented to the son, a year or two before, the alternative of going to school or of being driven from home. We have seen that on the very day before his death, the father had made arrangements to send this boy off to school. We know, from this boy's conduct when the people were hunting for the

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body of his father, and from his conduct after the body was found, and at the time of his arrest, and after his arrest, that he had grown hard, unfeeling, and fierce. It is not difficult to believe that the thought of parricide would arise in the perverted mind of such a youth, and that the small additional preparation for sending him off to school would furnish the momentum that would hurry the deadly thought into a deadly purpose, with the view of at once obtaining freedom from restraint and at the same time of avenging what we may well think appeared to his mind as the past tyrannies of his father.

So far we have considered the case without bringing forward the defense interposed in the evidence. That defense, in addition to plaintiff in error's personal denial of guilt, is an alibi. His mother, his brother Earl, and he himself all swear that at the time the murder was committed the plaintiff in error was sitting in his mother's room at their home. There are some variations in their testimony, but this is the substance of what each of them says. On this subject the plaintiff in error says that when his father left, starting to Troy, he "was in the hall, or out on the back porch at the water bucket." He says that after his father left "I came back in the house and sat down about five minutes, got up and walked in the yard about two minutes and a half or three minutes, then came back and sat down. I came back in the house, and my mother and brother Earl, and sister, and my small brother, Cecil, were in mother's

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room popping corn. When I went out of the house they had just put the popper on the stove, and when I came back they had just taken it off. I sat down and talked to mother until about half past 7 or 8. Then I went to bed." Further on in his testimony he says it was the children, Earl and Nona, that were engaged in popping corn. On cross-examination he testified that after his father left he went into the family room and sat there five or ten minutes; sat there smoking. The children were there, and his mother was in the dining room finishing the dishes after supper, putting them away. The children were popping corn. He then stepped out in the back yard, and remained about 2½ or 3 minutes. Earl had the popper on when he went out, and was just taking it off when he went back. The corn was burning or smoking, and he told Earl about it. His mother was in the room when he went back. She had finished the dishes. She was standing by a table looking at a paper. He sat there something like an hour and a half before any of those present (his mother, Earl, Nona, and Cecil) retired. He retired about 8 o'clock. At 6 o'clock he was sitting by the washstand in his mother's room. He heard the 6 o'clock whistle blow and looked at his watch.

Mrs. Holder says that when her husband left she was standing just inside the door of her room, and that Lee was in the room sitting by the side of the washstand; that as soon as her husband left she returned to the dining room, leaving Lee still sitting by the washstand;

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that what she had yet to do in the dining room before completing her work there was, to use her own words, as follows: "I had to pour the water out of my dishpan and pour a little more in it, and wash out my dishrag. Then I poured the water out and wiped out my dishpan, took the milk bucket and the milk cup, and hung them up. Then I walked across the room and fixed my churn, put a plate over that, then walked back across the room and got a straight chair and put it against the door, under the door knob, and went on in the other room. Just as I walked to the table Lee entered the room from the hall and sat down. He told Earl his corn was burning. I looked up and said: 'Yes; your corn is burning.' Q. When Lee came in, did you have hold of a paper? A. No, sir; I had just picked up the comb. I picked up the comb first and started to comb Cecil's hair, and when Lee spoke about the corn burning I looked up and said, 'Yes, Earl; you are burning your corn,' and Cecil turned away from us and went to see about the corn, and Earl was opening the popper, and I told them they would burn their hands, and then I picked up a paper and went to reading." She further testified that from the time she stepped out of the room, leaving Lee there, to go to the dining room and perform the work remaining there to be done, until the time she returned to her room, not more than four or five minutes elapsed, and that immediately after she entered the room Lee entered it, and did not leave it until 8 o'clock, when he went to bed. Asked if she heard the

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firing of a gun, or guns, that night, she answered: "I heard some firecrackers, as I thought; those large firecrackers. Q. About what time did you hear them? How long after you came into the room? A. Earl had just taken his corn out and was eating that; that was the first popper of corn. Just as Cecil turned away from me when I had started to comb his hair, I heard something go bang, bang, bang, two or three times, and I thought it was the negroes shooting firecrackers. Q. State whether either one of the children went to the window and looked out. A. Cecil did. I told him to go there and maybe he could see some Roman candles go out, and I told him to put his hands up to his face at the window and he could see; but just then Earl said they were firecrackers, and Lee said: 'Of course, they are firecrackers.' I said: 'Of course, they are firecrackers shooting; but they nearly always shoot Roman candles, too, when they are shooting firecrackers.' And while we were talking Cecil went to the window and looked, and said: 'Mammy, I don't see any.' And he jumped back to the corn." On cross-examination Mrs. Holder said that her husband called her from the dining room to help him on with his overcoat, and that as she entered her room in answer to this call, Lee followed her into the room, and that as soon as she had helped her husband on with the overcoat he went to the buggy; that after he left she returned to the dining room, and after she had finished her work there she went back to her room; that, as she entered it, Lee also entered; that she

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started to comb Cecil's hair, as before related, then the matter of the burning popcorn arose and was disposed of, and she sat down to read, and "read from then until 8, off and on"; that Lee was smoking his pipe part of the time; that she looked up once and saw him filling his pipe; that she does not know what else he was doing, except smoking, until he went to bed.

The boy, Earl Holder, fifteen years old, when he testified, said that as his father started off he (the witness) walked back into the kitchen (also used as a dining room) and picked up the popcorn popper and got some corn, and went right back into his mother's room, and while he was getting the corn Lee stepped out; that he had shelled about half an ear of popcorn when Lee came in, and was popping the corn. From other parts of his testimony it is clear the witness means that Lee was in his mother's room when witness started to the kitchen to get the popcorn and the popper, and that as witness left the room to go to the kitchen, or while he was in the kitchen, Lee also left his mother's room and went out into the hall, but came back as soon as the witness had shelled half an ear of popcorn, and while he was popping it; that he had just begun to pop the corn when Lee returned; that Lee did not leave the room again that night until he went to bed; that they were all talking together and eating popcorn during the evening until bedtime—does not remember what his mother was doing, does not remember whether she was reading; that while they were eating the first popper of corn he heard

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three firecrackers; that Lee was there in the room; that Lee came in when witness was popping the first popper of corn, and his mother also came in then; that Lee came in and sat down, and told him that his corn was burning.

When these three accounts of the matter are compared with some attention to their details, they are seen to differ materially. According to Lee's (plaintiff in error's) testimony, he was standing in the hall, or on the back porch at the water bucket, when his father started to Troy. According to his mother and Earl, he was in his mother's room. According to plaintiff in error's testimony, after his father left he went into his mother's room and sat there five or ten minutes, then went out and remained $2\frac{1}{2}$ minutes; that when he entered the room the children were popping corn, and when he returned, the corn they had put on the stove was burning, and he called their attention to it. According to Earl, the plaintiff in error entered the room when they had just put on the first popper of corn, and did not go out any more, but remained in the room until bedtime. According to the plaintiff in error, when he first entered the room his mother was there with the children. According to her testimony he entered the room just after she did. According to plaintiff in error and his mother, he left the room after the first popper of corn had been put on, and returned before it was taken off, in time to inform Earl that the corn was burning. According to Earl the plaintiff in error came in after the first popper of corn

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had been put on and did not leave the room after that time. According to plaintiff in error, he talked to his mother from the time his father left until about half past 7 or 8 o'clock, his bedtime. According to his mother, she read during that time. She says nothing about talking to Lee; that she did not see him do anything but smoke; that she looked up once, and saw him filling his pipe. Earl says he does not know what his mother was doing, does not know whether she was reading or not; that they spent the time talking and eating corn from supper time to bedtime.

In view of these contradictions and incongruities between the several accounts of the alibi, it is impossible to place reliance in the testimony of either of the witnesses. Moreover, we do not believe that any one would mistake the sound of a shotgun, threefourths of a mile away, for the popping of firecrackers. In addition to all of this, the plaintiff in error told the witness Muse that he was absent from the house ten or fifteen minutes. The story of the alibi is inherently inconsistent and incredible. But, aside from this, it cannot stand against overwhelming testimony of plaintiff in error's guilt furnished by the other evidence in the case which we have already set out and considered.

We shall now consider the assignments made upon questions of evidence.

It is insisted that error was committed in the admission of the testimony of Sam Moffitt concerning his

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recognition of the horse ridden by his house in the early evening of December 27th, just before and just after the murder, as one of Mr. Holder's horses, by the familiar sound of its hoof-beat upon the bridge near his home. The objection is to the recognition of the horse merely by the sound of its feet, without sight of the animal. The ground stated in the objection was that it was not competent for the witness to give his opinion upon such a subject. There is no force in this objection. The witness testified that he was familiar with the sound of the horse's feet when going in a lope, from having often seen and heard the animal lope. It was competent for him to testify to the fact, and to give his opinion as to the identity of the footsteps he heard with those of the Holder horse. One may become acquainted with the gait of a horse, just as he can with the walk of a human being, or the sound of a man's voice. Nonexpert witnesses may give their opinion upon a variety of questions, among others the identity of things. See *Railroad v. Hunton*, 114 Tenn., 609, and especially page 630, 88 S. W., 182, 188 referring to and approving and quoting from volume 1, section 676, of Elliott on Evidence.

The next point relates to an item of evidence not previously referred to in this opinion.

In October, 1906, all of the family of Rev. B. L. Holder, except plaintiff in error, fell suddenly ill, including one G. L. Williams, a hired farmhand. The illness supervened immediately after eating supper, and was manifested by violent vomiting, which lasted, with some in-

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permissions, for several days. Some of the family were affected more violently than others; but it was five days before they had all recovered. Dr. Hevener, who was sent for, first thought it was due to milk sickness; but upon examination of the calves, which he supposed had had access to the cows, and on finding them unaffected, he dismissed this theory. His next hypothesis was ptomaine poisoning; but this was likewise dismissed. His final conclusion was that the illness was due to arsenical poisoning. There were two symptoms, however, of such poisoning which he does not testify were present—the burning sensation in the stomach and purging. The former he says nothing of, and the latter he refers to, but says he gave medicine to produce purging, and therefore cannot say whether there would have been such result without the medicine. Dr. Nailing testified that the burning sensation does not always follow. There were other symptoms mentioned by him—cold, clammy skin and sunken eyes—that were not referred to in the testimony of Dr. Hevener. Dr. Nailing also speaks of colicky pains, and spasms in the calf of the leg. These symptoms were not referred to by Dr. Hevener, the attending physician, in his evidence. Dr. Nailing further testified that a patient suffering from acute arsenical poisoning would not be able to get up under two weeks' time, because it affects the nerves, and there is more or less paralysis of the legs. Mrs. Holder testified that she arose and cooked breakfast the next morning, and that the family ate breakfast, but that they

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continued ill for several days. Dr. Nailing testified that ptomaine poison would produce vomiting, also cramping and purging. Davie Bright testified that about two weeks before the sickness of the Holder family he sold to plaintiff in error a box of Rough on Rats. Plaintiff in error testifies that after his father recovered he learned that he was charged with purchasing this substance from Davie Bright, and that he went to see the latter, and cursed him, and denied that he had made the purchase, and he denied upon the witness stand that he had bought the substance. Davie Bright, however, is shown to be a young man of unimpeachable character, and he says the purchase was made. The plaintiff in error, besides his personal interest in the issue, and the facts, already referred to, which go to his credit, also admits that he forged his father's name to a check. We have no doubt that he bought the Rough on Rats.

G. L. Williams testifies that during the day, on the night of which the illness of the family occurred, plaintiff in error and he were gathering corn; that plaintiff in error was laughing and talking while the work was going on; that during the afternoon they went to the well at the house to get water; that plaintiff in error went into the house and remained ten or fifteen minutes, all of the family being absent from the house; that plaintiff in error said he was going into the house to change his socks; that after they quit gathering corn that day plaintiff in error said he was sick and was not going to eat any supper; that he had not been complain-

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ing of being sick during the afternoon; that plaintiff in error went in to the supper table and sat down; that he took a biscuit and cut off one corner; that witness then said, "I thought you were not going to eat any supper," and plaintiff in error then "just shoved his plate back" and ate only one or two bites; that witness ate supper, as did all the rest of the family except plaintiff in error, and all, except plaintiff in error, became sick; that witness felt "curious" before he got up from the table; that he smoked, and still felt "curious"; that plaintiff in error was lying on the bed, laughing at him; that he began vomiting, and continued vomiting until 11 o'clock; that plaintiff in error laughed at him when he was vomiting; that all of the sick ones were affected as he was, vomiting; that witness went to his brother's house, two hundred yards away, and sent for some medicine to check his vomiting, and after taking two doses he grew quiet and slept; that before witness left Mr. Holder gave plaintiff in error some calomel. Mrs. Holder testified that plaintiff in error was not well, but was suffering with fever, and that he took some calomel that night, under direction of his father, as a preparation for more specific medication for chills and fever, which she says he was suffering from. Plaintiff in error explains the circumstance of going into the house, or telling Williams at the time that he was going, to change his socks, by saying that his feet had a tendency to sweat and scald, and that he was compelled to change his socks frequently, and his mother in her

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testimony sustains him in this. Plaintiff in error denies, in his testimony, that he placed poison in the food of the family. There was no analysis of the contents of the stomach thrown up by any of the persons who were ill. A box of Rough on Rats, the ordinary commercial package, was exhibited in evidence, which Davie Bright testified was similar to the one he sold plaintiff in error. No analysis was made of the contents of the box produced which had been sold to plaintiff in error. The testimony of Davie Bright, a drug clerk, and of Dr. Hevener and Dr. Nailing, was that Rough on Rats was a poison—Dr. Nailing that the commercial substance known as “Rough on Rats” was composed of arsenic and charcoal; Dr. Hevener, that it was forty or fifty per cent arsenic. Mrs. Holder testified that the family continued to use the foodstuffs they had on hand the next morning, except the milk; that they did not use the milk.

The objection stated in the assignment of error is that the testimony was incompetent, because it tends to show the commission of a distinct, independent crime; also that there is nothing to show that plaintiff in error put any substance in the food partaken of by the family, hence that the testimony recited bore no relevancy to the issue.

These objections were substantially made on the trial to the testimony of Dr. Hevener, but not to the testimony of the other witnesses.

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The other witnesses, except G. L. Williams, were introduced by plaintiff in error.

As to the first point: So far as concerns the general question, we are of the opinion that previous attempts on the life of a person by the accused may be shown for the purpose of exhibiting the animus or state of mind of the accused towards the deceased, as indicating hostility, or a settled purpose to harm or injure that person. *Williams v. State*, 8 Humph., 585, 593, *et seq.*

In Hughes on Criminal Law and Procedure it is said: "Evidence of previous unsuccessful attempts to commit the same crime for which the accused is on trial is admissible." *Id.*, sec. 3134. To the same effect, see section 3137. In section 3138 it is said: "It is not a valid objection to evidence, otherwise competent, that it tends to prove the prisoner guilty of a distinct and different offense. Evidence of other offenses is admissible to prove intent, motive, knowledge, malice, and the like." In section 3140 it is said: "On a charge of attempting to poison a person by putting poison in his cup, it is proper to show in the evidence that a few days before, on a different occasion, a similar substance was found in his cup and saucer, and that drinking from the cup made him sick. Other facts than those alleged in the indictment may be shown in the evidence for the purpose of showing a system or plan of the party concerned in the transaction alleged in the indictment." In section 149 it is said: "Where the prisoner was charged with the murder of her child by poison, and

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the defense was that its death resulted from an accidental taking of such poison, evidence that two other children of hers and a lodger in her house had died previous to the present charge under like circumstances by poison was held to be admissible." In Wharton on Homicide it is said: "Previous attempts to kill the person afterwards killed warrant an inference of express malice or deliberation and premeditation in killing, as a presumption which will sustain a conviction of murder in the first degree." *Id.* (3 Ed.), p. 235, sec. 155. In the same work it is said: "Prior attempts by the accused to kill the deceased may be given in evidence, and so may evidence of a prior aggravated assault. And lapse of time between the previous quarrel or difficulty and the homicide goes only to the weight of the evidence. It does not affect its admissibility." *Id.*, p. 925, sec. 599. There can be no question, then, of the competency of evidence of previous assaults upon, or attempts to kill, the deceased by the prisoner.

As to the second point, the relevancy of the evidence, we think this equally clear. The weight of the evidence was for the jury; but we think there can be no doubt that the facts recited, either when taken all together or when we consider alone those brought out by the witnesses for the State, have a tendency to show that the plaintiff in error attempted to poison the whole family there at home (Dolphus was absent), including his father. Whether the inference afforded be very slight,

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or what degree of strength the facts show, we need not determine. It is sufficient to say that the testimony had some relevancy, and was therefore competent.

The next question arises upon the following occurrences shown in the bill of exceptions: As before stated, Mrs. Holder, the mother of plaintiff in error, was introduced in his behalf, and gave evidence tending to support an alibi for him; that is, to the effect that plaintiff in error was in her family room at home, in her presence, before 6 o'clock, at 6 o'clock, and thereafter until 8 o'clock, on the night of December 27, 1906, and hence could not have killed his father in a field near the road, three-fourths of a mile away, at 6 o'clock.

On cross-examination, Mrs. Holder was asked the following question: "At your house, on Saturday afternoon, after your husband had been killed, in the presence of those parties you have stated were there, state whether or not you said this: 'Is it possible that I have raised a boy that would kill his father?' And your daughter Nona said, in substance: 'Maybe Lee didn't kill him.' And you replied: 'Yes; I will have to admit that he did it.'" She answered: "I didn't say anything like it."

When the question was put, the attorney for the plaintiff in error objected on the ground that it was incompetent, because it called for the mere opinion of the witness; that is, because the witness was asked to state whether she had expressed the opinion referred to. The objection, however, was overruled, and the wit-

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ness was directed to answer, and made answer as just set out.

Afterward Mrs. Hevener, one of the persons referred to in the question as being present, was placed upon the stand in rebuttal. After identifying time and place, Mrs. Hevener was asked questions and answered as follows:

"Q. I would ask you to state, Mrs. Hevener, while you were there, you heard this statement made by Mrs. Holder, or this in substance"—repeating question propounded to Mrs. Holder; and this was followed by a repetition of the objection above quoted. The witness answered that Mrs. Holder did make the statement referred to, in substance.

Subsequently in the course of her examination the circumstances under which the statement was made were thus detailed by Mrs. Hevener, and the actual words used according to the witness' recollection:

"I walked up to her bedside. I did not speak, for I feared to speak to her, for I did not know how she was. She opened her eyes and saw me"—witness was a sister of the deceased—"and began screaming, and said, 'Oh, how can we stand it?' And I said: 'It is awful bad; but we have to stand it.' I turned. I couldn't stay there, and I started to walk out, and stopped at the foot of her bed, and she said: 'Is it possible that I have raised a child that would kill his poor papa?' And Nona began to console her, and said: 'Mama, don't you worry and kill yourself, for what

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would we do without you, and maybe Lee didn't do it.' She said: 'Yes, he did, Nona; yes, he did.'"

It is insisted by the State that the evidence was competent for the purpose of impeaching the witness Mrs. Holder; secondly, that, if incompetent, no injury was done the plaintiff in error, inasmuch as this evidence was withdrawn from the jury.

The charge is not a part of the bill of exceptions, hence cannot be looked to; but the attorney-general refers to the fourteenth paragraph of the motion for a new trial as containing an admission that the evidence was withdrawn. That paragraph reads as follows: "The court permitted the attorney-general to ask Mrs. J. B. Hevener certain questions tending to impeach Mrs. B. L. Holder, which questions were objected to by defendant, and said questions were not withdrawn from the jury until the charge of the court; and it is attempted to withdraw said illegal and irrelevant testimony. It is submitted that said illegal and incompetent testimony was calculated to prejudice and may have prejudiced the interests of the defendant, and should never have been permitted to go before the jury, and the court was in error in so doing."

As to the question of competency: The rules applicable to the subject are thus laid down in Wigmore on Evidence (volume 2): "*What amounts to a self-contradiction.* In the present mode of impeachment there must, of course, be a real inconsistency between the two assertions of the witness. The purpose is to in-

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duce the tribunal to discard the one statement because the witness had also made another statement which cannot at the same time be true. Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required. Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But it must appear *prima facie* before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words and phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?" *Id.*, sec. 1040.

The author continues in the next section: "*Opinion as Inconsistent*. A common difficulty is to determine whether some broad assertion, offered in contradiction, really assumes or implies anything specifically inconsistent with the primary assertion. The usual case of this kind is that of a general statement upon the merits of the controversy, which is now offered against a witness who has testified to a specific matter. Thus, A testifies for the prosecution that he saw the defendant near the scene of the alleged arson; it is offered to show that he has elsewhere declared that he is sure the defendant is innocent; is this admissible? The usual answer of some courts is that the declaration

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should be excluded, because it is a mere opinion. This is unsound (1) because the declaration is not offered as testimony, and therefore the opinion rule has no application; and (2) because the declaration in its opinion aspect is not concerned, and is of importance only so far as it contains, by implication some contradictory assertion of fact. In short, the only proper inquiry can be: Is there, within the broad statement of opinion on the general question, some implied assertion of fact inconsistent with the other assertion made on the stand? If there is, it ought to be received, whether or not it is clothed in or associated with an expression of opinion." *Id.*, sec. 1041.

Necessarily there will be much room for difference of opinion in applying the rule to concrete cases as they arise. We think, however, it is clearly applicable to the case before us. Mrs. Holder went to the place where her husband was murdered, and saw him as he lay there dead, about three-fourths of a mile from home, in a field on the roadside. If her son was in her presence all the time, with the exception of four or five minutes, after his father left, until he went to bed at 8 o'clock, she knew that he could not have committed the murder. Her statement, therefore, to Mrs. Hevener, or in Mrs. Hevener's presence, that she must admit her son was guilty, or that she believed him guilty, while in form the statement of an opinion, necessarily implied a contradiction in fact of her subsequent statement on the witness stand that her son was

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in her presence at the time of the murder; that is, necessarily implied the statement that her son was not in her presence at the time she said he was. If he had really been with her all the time she says he was, a belief of his guilt could not have entered her mind.

We are referred to our own case of *Saunders v. City & Suburban Railroad Co.*, 99 Tenn., 130, 41 S. W., 1031, as being in conflict with the rule laid down by Wigmore. In that case it appeared that Dr. Saunders had been injured while crossing a street railroad track in his buggy, for which injury he sued the company. His daughter was with him at the time the accident occurred. On the trial she gave testimony which tended to show that the servants of the street railway company were negligent, and that by this means the injury was inflicted upon her father. For the purpose of contradicting her, she was asked on cross-examination if she did not state at the time, in the presence of certain persons, that the accident was due to her father's fault. She denied that she made any such statement. The railroad company introduced witnesses in rebuttal who testified that she did make that statement in their presence at the time and place fixed in the impeaching question. When the case reached this court on appeal, it was held error to permit the asking of the impeaching questions and the introduction of the subsequent impeaching evidence. It is true that the reason given in the opinion of the court was that the statement made by Miss Saunders was the mere expression of an opinion on her

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part, which would not have been admissible as original evidence, and could not, therefore, be admissible in contradiction; and numerous cases so hold, as shown by the citations contained in that opinion, and the same rule may be found laid down in certain subsequent Texas cases, viz.: *Scott v. State* (Tex. Cr. App.), 93 S. W., 112; *Watson v. State* (Tex. Cr. App.), 95 S. W., 115, 116; *Barbee v. State* (Tex. Cr. App.), 97 S. W., 1058. But we think a truer expression of the underlying reason, or the governing principle, is contained in the excerpts which we have made from *Wigmore*; and the case of *Saunders v. City & Suburban Railroad Company* was well decided within that principle. The liability of the railroad company depended upon mixed questions of fact and law, that could be determined only by the court and jury, while the opinion of Miss Saunders, if competent, could be of value only as placing her in the position of the tribunal. Her opinion that her father was to blame involved the proposition that her father's negligence was the proximate cause of the accident, and necessarily involved a survey of all of the attending facts, and a conclusion or inference therefrom. There was in her expression of opinion no implied statement of fact inconsistent with the testimony which she had given. Of course, the opinion of witnesses, except in the well-defined class of cases where opinion evidence is admissible, cannot be used for or against one or the other of the litigants, either as direct evidence, or by way of impeachment; but this observa-

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tion does not apply where the expression in the form of an opinion implies the statement of a fact clearly in conflict with the statement of the witness on the stand whose testimony is sought to be impeached thereby.

Some illustrations from the cases in other jurisdictions may be found useful.

In *State v. Kingsbury*, 58 Me., 238, the prisoner was convicted of inciting, hiring, etc., one James Kitchen to burn a house. The prisoner's wife (a competent witness in that State) testified that she was present during the conversation between defendant and Kitchen, and that nothing was said or done by the defendant to induce Kitchen to burn the house, and that defendant did not furnish Kitchen a certain kerosene lamp filler with which it was sought to prove the house was fired. The State offered proof, which was admitted, that witness had said to Sawyer, about a half hour after her husband's arrest, on being told by Sawyer that Kitchen had confessed that defendant had hired him to burn the house, viz.: "Well, he would never have done it if it had not been for others. . . . Others are more to blame than he was." This was held competent. The court said: "Whenever a witness has testified to any material facts, any acts or declarations of his which appear to be inconsistent with such testimony are competent by way of contradiction. It is not necessary that the contradiction should be in terms. Statements by the witness, inconsistent with his testimony on material matters, may be proved

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against him." In *Conuc. v. Wood*, 111 Mass., 411, a conviction for overdriving a horse, defendant's mother testified that she saw him driving the horse, and that he did not overdrive it. The State proved, after laying proper grounds, that she had said to a witness that defendant was guilty. This was held competent. In *Mayer v. People*, 80 N. Y., 377, it appeared that there was a conviction for obtaining goods by false pretenses. Ferdinand Mayer, an uncle of the prisoner, had testified for him; his testimony strongly "tending to sustain defendant's denial that he had made the representations charged." The State was permitted to prove, as tending to impeach his testimony, that the witness had said that defendant "had done a great wrong" in the matter, and that defendant and his partner had "acted as thieves." In the case of *State v. Baldwin*, 36 Kan., 14, 12 Pac., 318, there was a conviction of William Baldwin for the murder of his sister. The case was made out by circumstantial evidence; the theory of the defense being that the deceased suicided. In its opinion the court said: "The objections urged to the questions asked the clergyman, Mulford, on cross-examination, are not good. After stating, in his examination in chief, what the conduct and appearance of the defendant was soon after the death of his sister, with a view of showing the conscious innocence of defendant, it was proper to inquire if the witness had not stated, before the coroner's jury, that defendant impressed him

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at once of being guilty of the murder. It was allowable on cross-examination, and, besides, if denied, it afforded a foundation for impeaching the witness. He gave a qualified answer, saying that he would not deny or affirm that he had so stated, but did deny stating that he had a thorough impression of his guilt, and he added that the appearance of the defendant was that of a painful surprise that any one should suspect him of the offense. We cannot agree that the rule was erroneous." In the case of *Franklin v. Commonwealth*, 105 Ky., 237, 48 S. W., 986, Noah Franklin was convicted of murdering Daisy Sullivan, and sentenced to life imprisonment. The deceased was a young woman about seventeen years of age and about to become a mother. There was evidence tending to show that the prisoner was the author of her ruin. The evidence relied upon by the State was wholly circumstantial. Ed. Howard, a witness for the State, testified on the trial that over a month before deceased was killed, defendant told him he was going to kill her, and that some conversation followed this statement as to the manner and method by which she should be killed. After stating this testimony, the court said in its opinion: "It appeared in evidence that appellant was discharged on the examining trial, and the witness Ed. Howard was asked, on cross-examination, if he did not say to W. J. Cox and two others, after this trial, at a time and place specified, that appellant had come clear, and that he knew he had nothing to do with the killing of Daisy

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Sullivan. He denied making this statement, and the court refused to allow him to be contradicted on this point by the other witnesses. Without his testimony, I do not think appellant could possibly have been convicted, and it seems to us that his statement, at the time, that he knew appellant had not killed Daisy Sullivan, was so different from his testimony given on the trial that the court should have admitted proof of his having made those statements for the purpose of impeaching his testimony." In *Schell v. Plumb et al.*, 55 N. Y., 599, plaintiff sued for an alleged breach of contract made with defendant's testator to support plaintiff during her life. Jacob Harris, a witness for defendant, said that he was present during conversations between plaintiff and defendant's testator in which plaintiff admitted that she had no such contract. On cross-examination he was asked if, since the death of testator, he had not, in speaking with reference to the alleged contract, said that "the old lady ought to have \$1,000 out of the estate." He denied this, and plaintiff was permitted, over objection, to prove that he had so stated. This was held not error.

The whole court being of the opinion that the testimony objected to was competent, we need not go into the question whether the recital in the motion for new trial upon the subject of the withdrawal of the evidence, nothing else appearing in the record upon the subject, is sufficient evidence of the fact that there was a withdrawal in proper form, a subject upon which there is

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a difference of opinion among the members of the court.

Errors are assigned upon the charge of the court; but, as that instrument was not made a part of the bill of exceptions, they cannot be considered. There was also an error assigned upon the refusal of the court to entertain an affidavit for a continuance, but this affidavit failed, also, of incorporation into the bill of exceptions, and the point cannot be considered.

After full consideration, as above, of the points presented for reversal, we are of opinion there was no error in the judgment of the court below, and it must be affirmed.

State, ex rel., v. Taylor.

STATE, *ex rel.* BATE BOND, State Revenue Agent, v.
THOMAS J. TAYLOR, County Trustee.

(*Jackson*. Special September Term, 1907.)

1. **TAXATION.** County trustee possesses jurisdiction to reassess or back assess property for taxation, when.

A bill alleging that a street railway company's property was glaringly and inadequately assessed for taxation at much less than its cash value for certain specified years; that the company's schedule returns were fraudulently incorrect, etc.; and that this, in conjunction with the negligence of the assessors, resulted in relieving a large part of such property from taxation, states a case for the exercise of the county trustee's jurisdiction in a proceeding before him for the reassessment or back assessment of defendant's property for taxation. (*Post*, pp. 233-246.)

Acts cited and construed: Acts 1903, ch. 285, sec. 31, subsecs. 2, 3, and 5.

2. **SAME.** Mandamus will lie to compel county trustee to take jurisdiction of proceeding for reassessment or back assessment of property for taxation, when.

Where a county trustee possesses jurisdiction of a proceeding for the reassessment or back assessment of property for taxation instituted by a State revenue agent, and declines to take jurisdiction and erroneously refuses to hear such proceeding because of the alleged want of jurisdiction, a writ of *mandamus* will lie as the proper remedy to compel such county trustee to take jurisdiction of the proceeding and to hear the same, and render some judgment on the merits. (*Post*, pp. 245-252.)

Acts cited and construed: Acts 1903, ch. 258, sec. 38.

Cases cited and approved: State, ex rel., v. Hunter, 3 Wash., 92, and citations; Richardson v. Farrar, 88 Va., 760, 766-770; State, ex rel., v. Judge, 34 La. Ann., 1177; State, ex rel., v. Ellis, 41 La. Ann., 41.

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3. SAME. Railroad commissioners are ex officio State tax assessors.

The board of railroad commissioners created by Acts 1897, ch. 10, became also a board of State tax assessors *ex officio* under a prior statute (Acts 1897, ch. 5, sec. 1) providing for a board of State tax assessors to be appointed by the governor, in case an act should not be passed at the same session of the legislature creating a board of railroad commissioners, and, in case such act should be passed, then that the duties prescribed in said act contained in said chapter 5 should be devolved upon such railroad commissioners. (*Post*, pp. 252, 253.)

Acts cited and construed: Acts 1897, ch. 5, sec. 1; ch. 10.

4. STATUTES. Act not purporting to amend a former law need not recite its title or substance.

The statute contained in Acts 1905, ch. 513, providing for the just and equitable assessment of interurban railroad and street railroad property for State and municipal taxation, and for the collection of taxes assessed and imposed thereon, etc., is an independent act complete itself, and not purporting to be amendatory of Acts, 1897, ch. 5. If the act is amendatory at all, it is only an implied amendment, and its failure to recite the title or substance of the said act of 1897 does not invalidate it. (*Post*, pp. 253, 254.)

Acts cited and construed: Acts 1897, ch. 5; Acts 1905, ch. 513.

Constitution cited and construed: Art. 2, sec. 17.

Cases cited and approved: *Poe v. State*, 85 Tenn., 495; *Railroad v. Crider*, 91 Tenn., 506, 507; *State v. Yardley*, 95 Tenn., 558.

5. SAME. Act for taxation of interurban and street railroads extending beyond the city limits is not unconstitutional as class legislation, when.

Acts 1905, ch. 513, providing for the just and equitable assessment of interurban railroad and street railroad property in a particular manner for State and municipal taxation, and for the collection of taxes assessed and imposed thereon, applies

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only to interurban railroad lines and street railroad lines extending beyond the boundaries of a single city, whether they run to any other city or not; and so construed is not unconstitutional as an improper classification of property for taxation. (*Post*, pp. 254-256.)

Acts cited and construed: Acts 1897, ch. 5, sec. 7; Acts 1903, 258, secs. 22, 24; Acts 1905, ch. 513.

Constitution cited and construed: Art. 11, sec. 8.

Cases cited and approved: *Franklin Co. v. Railroad*, 12 Lea, 521, 534, 542.

6. **SAME.** Subject in body covered by the title; case in judgment. Acts 1905, ch. 513, entitled "An act to provide for the just and equitable assessment of interurban railroad and street railroad property for State and municipal taxation, and for the collection of taxes assessed and imposed thereon," and in section 3 declaring that every person or corporation operating interurban and street railroad properties, including electric light and power properties, when owned and operated in conjunction with street railroad properties, shall file a specified schedule for taxation of the same under such act, does not introduce and embrace in its body a new subject not covered by the title, because the provision of said section applies to interurban railroad or street railroads owning and operating electric plants for the sale of surplus electricity generated for the operation of the railroad and not to separate electric light plants owned by railroads. (*Post*, pp. 242, 256-263.)

Acts cited and construed: Acts 1903, ch. 258, secs. 22, 24; Acts 1903, ch. 406, sec. 1; Acts 1905, ch. 513, sec. 3.

Constitution cited and construed: Art. 2, sec. 17; art. 11, sec. 8.

7. **SAME.** A separable subject in the body not embraced in the title may be eliminated without impairing the rest of the act, when.
A provision in the body of the act not embraced in its title will not invalidate the residue thereof, where such provision is

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merely incidental and may be eliminated without impairing the integrity of the act. (*Post*, pp. 256, 257, 260.)

Acts cited and construed: Acts 1905, ch. 513, secs. 3, 18.

Constitution cited and construed: Art. 2, sec. 17.

Cases cited and approved: *State v. Wilson*, 12 Lea, 246, 254; *State, ex rel., v. Trehwitt*, 113 Tenn., 561.

8. **SAME.** Provisionas to street railroads construed to apply to interurban railroads also, when,

While section 18 of Acts 1905, ch. 513, speaks of street railroads only, yet it is clear that construing the whole act together it was intended by the legislature in this section to cover, not only street railroads, but interurban railroads as well. (*Post*, p. 257.)

9. **MANDAMUS.** Peremptory writ will issue upon the overruling of a demurrer, when there is no valid defense.

Where, in a *mandamus* proceeding to compel a county trustee to hear and determine an application for the back assessment and reassessment of street railway property, the defendant's demurrer was overruled on appeal, and it appeared that no valid defense could be made, a peremptory writ of *mandamus* will be awarded without leave to answer. (*Post*, pp. 258, 259, 264, 276, 277.)

10. **TAXATION.** Action of board of equalization is not final as against reassessment before county trustee, when,

Under the assessment laws of 1901 and 1903, neither the action of the county board of equalizers nor that of the State board of equalization was final or conclusive, in the sense that it prevented a further back assessment or reassessment, for taxation, of property inadequately assessed or entirely omitted from assessment. (*Post*, pp. 266-277.)

Acts cited and construed: Acts 1901, ch. 174, secs. 33, 38; Acts 1903, ch. 258, secs. 13-19, 21-26, 31, 33, 38, subsecs. 4, 10 11; Acts 1905, ch. 513.

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FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
F. H. HEISKELL, Chancellor.

ATTORNEY-GENERAL CATES and CARROLL & MCKEL-
LAR, for complainant.

JAMES C. BRADFORD and E. E. WRIGHT, for defend-
ant.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed in the chancery court of Shelby county to obtain a *mandamus* against the county trustee of Shelby county, in respect of an application made by relator before the latter, concerning a reassessment, or back assessment, of the property of the Memphis Street Railway Company. The chancellor awarded an alternative writ, which was served upon the defendant. The latter, instead of making a return to the writ directly, demurred to the bill, and this was treated in the court below as properly raising the questions presented in the case, and will be accordingly so treated here, without passing upon the propriety of the practice adopted. The chancellor sustained the de-

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murrer and dismissed the bill, and from this decree the complainant has appealed to this court, and has here assigned errors.

Before stating the substance of the bill and demurrer, we shall set out the sections of the statute that control the controversy, viz.: Section 31 and section 38, subsec. 11, chapter 258, pp. 660, 674, of the Acts of 1903:

"Sec. 31. That any property or properties included in this act shall be back, or re-assessed for the period now provided by law, viz.:

"(1) When the same have been omitted from or escaped taxation.

"(2) When the same has been willfully or knowingly, or by the negligence of the tax assessor, or board of equalizers, assessed or computed at a value less than its actual cash value.

"(3) When the same has been assessed by the assessor or computed by the board of equalizers at less than its actual cash value by reason of any fraud, deception, misrepresentation, or misstatement of the owner of the property or his agent or attorney.

"(4) When the owner of the property connives at or fraudulently procures, or induces an assessment to be made by the assessor, or computed by the board of equalizers at less than its actual cash value.

"(5) When the owner, or his agent, fails, refuses, or neglects to list the property to the assessor, as required by law.

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“(6) Whenever it is within his knowledge or he has reason to suspect in his county that any property has, in violation of this act as above prescribed, been assessed by any assessor, or computed by any board of equalizers at less than its actual cash value, it shall become the duty of any revenue agent, or any district attorney, or any attorney of the county, of the judge or chairman of the county court, of the county court clerk, of any circuit, chancery, and criminal court clerk, of any sheriff, and of any citizen of the county, to cause or have the county court clerk, in the case of merchants' taxes, and the county trustee, in case of other taxes covered by this act, to have issued the citation hereinafter set out, for the purpose of back or re-assessing such property. At the request of or upon the information or motion of any citizen or taxpayer of the State, or of any of the officers above named, it shall be the duty of the county court clerk, in the case of merchants' taxes, and the county trustee, in the case of other taxes covered by this act, to issue, for the purpose of back or re-assessing property, the citation hereafter set out. The county court clerk, in the case of merchants' taxes, and the county trustee, in the case of other taxes covered by this act, upon the motion or information, or at the request of any citizen or taxpayer of the State, or of any of the officials before designated, or when the same is within the knowledge of, or suspected by the county court clerk, or county trustee, shall issue as to any property assessed or valued in

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violation of this act, at less than the actual cash value of the same, a citation to be served by any officer of the county or of any district thereof, upon the owner of the property, or his agent, or representative, or attorney, summoning him to appear before such clerk or county trustee, at his office giving not less than five days' notice from the date of the issuance of the citation and show cause, if any, why said property should not be back or re-assessed at its actual cash value. The form of citation shall be substantially as follows, viz.:

"State of Tennessee, ——— County.

"To ———, at ———, Tenn.:

"Proper motion having been made before me by ———, State revenue agent for the State of Tennessee under section ———, chapter ———, of the Acts of Tennessee, 190—, you are hereby cited to appear before me, ———, trustee or county court clerk for ——— county, Tennessee, on the ——— day of ———, 190—, at ——— o'clock ——— M., for the purpose of being assessed or re-assessed for the years ——— upon omitted or inadequately assessed property in the said county and State, and show cause, if any, why said property should not be back or re-assessed at its actual cash value.

"—————

"Trustee or county court clerk,

"——— county, Tenn.

"Issued at office this ——— day of ———, 190—.

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"The officials herein named as having power to back or re-assess property, are vested with full authority to administer oaths, send for and examine witnesses, and take such steps as may be deemed necessary or material to obtain information and evidence as to the value of the property. Said witnesses, when properly summoned, shall be amenable to existing laws for non-attendance or failure to give evidence which is in their knowledge.

"Said officials herein vested with the power to back or re-assess property shall have full authority, in proceedings, to back or re-assess such property, to make proper, correct, and adequate assessments of the same at its actual cash value, which, when entered upon the tax books or filed in writing with the authorized tax-collecting authority, shall become a final and valid assessment of the property, and collectible as such, as fully and amply as if originally entered upon the assessment rolls. Should it appear that any property has been assessed at less than its actual cash value, in violation or in disregard of the provisions of this act, the official back or re-assessing the same, shall add to the assessment a penalty of fifteen per centum upon the amount of the added tax, and the cost of the proceeding, which said penalty and cost shall become a part of the taxes and collectible as such. If the proceeding is determined in favor of the owner of the property, the cost shall be paid by the county.

"It shall be the duty of the clerks of the county courts

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to examine and compare the assessment rolls of the county with the inventories or reports of administrators and executors as soon as filed with the county court clerk, for the purpose of ascertaining whether any personal property of any estate is subject under this act to back or re-assessment. In case such examination shall show any personalty subject to such back or re-assessment, the clerk of the county court shall report the same to the county trustee, who shall back or re-assess the same, under the provisions of this act, and add thereto the penalty heretofore designated.

"In case the county court clerk or county trustee shall fail or refuse to perform the duty herein imposed, such clerk or trustee shall become liable, on his official bond for the amount of taxes which might have been recovered had said duty been properly performed, together with a penalty of fifteen per cent. added thereto, said liability and penalty to be recovered in any court of record or before any justice of the peace at the instance of any district attorney or revenue agent of the State, or by suit, or by motion or five days' notice in the chancery or circuit courts, or before any justice of the county."

"Sec. 38. That the secretary of state, treasurer, and comptroller of the treasury of the State, and their successors in office, are hereby created a State board of equalization and invested with the powers and required to perform the duties hereinafter prescribed, viz.:

. . .

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“(11) Said board of equalization shall also hear appeals upon matters of back or re-assessments made by revenue agents or other officers of the State from county trustees or county court clerks. The right of appeal from the decision of said trustees or county court clerks in the matter of back or re-assessments is hereby given to the State and county or party assessed or re-assessed; provided, said appeal is prosecuted within ten days from the date of such back or re-assessment or attempt to back or re-assess, and the said trustee or county court clerk shall, upon such appeal being perfected, certify his action to the State board of equalization, whose duty it shall be to hear the matter in controversy within ten days from the filing with them, or either of them, the notice of appeal, provided, said board is then in session.”

The bill alleges: That it came to the knowledge of relator “that, in violation of the provisions of the law, the property of the Memphis Street Railway Company was assessed at less than its actual cash value, and glaringly and inadequately assessed for taxation.” That for “the years 1902, 1903, 1904, 1905, the Memphis Street Railway Company did not comply with the provisions of law in regard to returning its property for taxation.” “That on the 25th day of May, 1904, the Memphis Street Railway Company, by its vice-president, filed a schedule purporting to comply with the law, and therein set forth and stated, among other things, that the bonded debt of the company was \$906,-

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000 of the market value of about par. The quoted value on the above date was 113. That the stock of the corporation authorized was \$500,000, all of which was issued, and that it had no market value except for control. A copy is annexed hereto as a part of this petition. The relator has not been able to obtain the tax schedules for the years 1903 and 1902, but he avers to the court that the one last above referred to is misleading and erroneous in several particulars, but, upon the schedule so returned, misled thereby, the assessor, through negligence, fixed the actual cash value of the property of the Memphis Street Railway Company at \$1,700,000, when, in truth, as relator is informed, believes, and from information avers, its actual cash value was then \$7,500,000." "That during the years 1902, 1903, 1904, instead of there being a little upwards of \$900,000 of bonds outstanding, there were upwards of \$4,000,000, if not \$5,000,000, outstanding, with fixed charges thereon amounting to over \$250,000 annually. The relator avers that under the seventh subsection of the law requiring a schedule there is provided that an itemized statement of all stocks and bonds, securities, notes, accounts, and choses in action owned or held, whether the same be unincumbered or transferred or deposited, or used as collateral, wherever the same may be situated, and also all money on hand or on deposit, wherever the same may be situated, shall be set forth, and that, notwithstanding this statutory requirement, the relator avers that at no time did the street railway

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company comply therewith, and notwithstanding the fact that it had properties enumerated and called for in the aforesaid section. The relator further shows to the court that under the assessment laws of the State, the latest of which is to be found in the Acts of 1903, the Memphis Street Railway Company was subject to be assessed for taxation upon its properties, but there is no controversy that can arise but that under the assessment law of 1903, and the previous law of 1901, which is, in all respects material, similar to the one of 1903, it is subject to be assessed for taxation, and to be re-assessed or back assessed.

"The relator further avers that for the years 1902, 1903, 1904, 1905, the property of the Memphis Street Railway Company was grossly undervalued; that said undervaluation was due to the negligence of the officers charged with the duty of assessing the same, and to the failure of the owner of the said property to comply with the statute; and thereby the said owner escaped its share of the public burden."

In respect of the taxes for the year 1905, the following special additional allegations were made:

"The relator is advised that it (the property of the street railway company) is also subject to be back assessed for taxation for the year 1905, under the assessment law of 1903, because he avers by advice of counsel that the special act passed on the 15th of April, 1905, being chapter 513, p. 1152, of the session acts of that

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year, is violative of the provisions of the organic law, and particularly violative of that provision of the constitution, which ordains that no bill shall become a law which embraces more than one subject, that to be expressed in the title.

"Aforesaid chapter is an act to provide for the just and equitable assessment of interurban railroad and street railroad property for State and municipal taxation, and for the collection of taxes assessed and imposed thereon, but, by the third section thereof, there is included electric light and power properties, when owned and operated in conjunction with street railway property, which is a foreign subject, altogether to the title, and so interwoven with the other provisions of the act as to render the whole void.

"And the relator is further advised that the said act is inoperative and void, because it is class legislation, in that it fails to fix as the assessable value of the property of interurban and street railroad companies the actual cash value of the same, thereby improperly classifying such property for taxation upon a different basis of value from that arbitrarily fixed and required upon all the other properties of the State subject to taxation.

"The relator further shows that he is informed, believes, and from information avers the fact to be that in the early part of 1905 the shareholders in the Memphis Street Railway Company sold the entire stock in that company to Mr. Newman and his associates at and for

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a sum approximating \$7,500,000, excepting from said sale certain real estate which was of the value of \$200,000 or \$300,000; that the Memphis Street Railway Company was organized about the year 1895, and it acquired all the physical property, franchises, and shares of stock in the Citizens' Street Railway Company, the Raleigh Springs Railway, the East End Railway, the Prospect Park and Dummy Line, which said shares of stock are embraced and enumerated in a mortgage which it executed to secure the payment of \$5,000,000 of bonds bearing five per cent interest; that after the purchase of the said property by Mr. Newman and his associate, and to wit, on the 23d of August, 1905, under the aforesaid unconstitutional act, the railroad commission assessed the property for taxation at \$3,212,131.64, or upwards of \$4,000,000, less than the relator was informed, believes, and avers Mr. Newman and his associates paid for the said property.

"The relator further shows to the court that very shortly after the purchase of the said property the capital stock of the corporation was increased from \$500,000 to \$5,000,000 being \$2,000,000 of preferred stock, and \$2,500,000 of common stock, and that on the 21st of June of that year the preferred stock sold in the market at \$90 per share, and the common stock for \$60 or \$70 per share, the shares being \$100 each."

Upon the subject of the relator's efforts to obtain from the county trustee a reassessment or back assess-

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ment of the property, the bill contains the following allegations:

That, when the above facts came to the relator's knowledge, he "requested the defendant to issue a citation provided for by law to the defendant company, summoning it to appear before him to show cause if any why its property should not be back or reassessed at its actual cash value. The aforesaid citation was duly issued and served, and the defendant street railway company duly appeared before the said defendant, who at its request, from time to time, postponed the hearing, until Monday, the 16th day of July last, when, after hearing argument on the question, the defendant affirmed that he could not take jurisdiction of the matter, and declined to further proceed in accordance with the citation. In short, the defendant, being of opinion that he was without jurisdiction of the matter, refused to take it. . . . The relator is advised that he is entitled to have the defendant perform the clear ministerial duty pointed out by the statute, namely, proceed to hear the complaint of the State of Tennessee, and to back assess, or reassess, the properties of the Memphis Street Railway Company, to make proper, correct, and adequate assessment of the same at its actual cash value, and he is advised that the State of Tennessee has no other adequate remedy than through the mandate of this court." It is further alleged that the relator "sought, as it was his duty to seek, to set in motion the proceedings necessary, as provided by

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the State of Tennessee, in the exercise of its sovereignty, to avail itself of the remedy provided for the illegal deficiency, and, although the statute plainly provided for the performance of a duty by the defendant to reassess the aforesaid property, he declined to assume jurisdiction so to do, leaving the State of Tennessee without any adequate remedy for the collection of the just burden of government upon the properties of the said Memphis Street Railway Company."

The demurrer filed to the bill has numerous subdivisions, but may be stated adequately in two parts. The first part attacks the whole bill in so far as the latter undertakes to state a basis for any relief whatever against the defendant. The substance of this part of the demurrer is that the allegations of the bill, when rightly construed, mean, that the county trustee considered the matters brought to his attention by the citation, and adjudicated them against the complainant; that upon such a state of facts the remedy of the State was an appeal to the State board of equalization, and that, therefore, the chancery court had no jurisdiction to award the writ of *mandamus*; that an application for the latter relief cannot be successfully made when the party has any other adequate relief; that, if the party, at one time, had the right to such relief—that is by appeal to the State board of equalization—and lost it because of failure to apply in time, such party could not thereafter be properly granted a *mandamus*; that the decision of the county trustee was a

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judgment, and the chancery court had no jurisdiction to review that judgment by or through the writ of *mandamus*, or in any other way, or to compel the county trustee to change his judgment in any manner whatever; that such change could be effected only by an appeal taken and prosecuted in due time to the aforesaid State board.

The second part of the demurrer presents the point that the act of 1905 referred to in the bill is constitutional, and the assessment for that year was properly made thereunder.

Before directly taking up for consideration the points in the demurrer, we deem it proper to say that we think the facts stated in the bill, which we have set out, make out a case for the jurisdiction of the county trustee to reassess, or back assess, the property of the Memphis Street Railway Company, within subdivisions 2, 3, and 5, of section 31, above set out, of chapter 258, p. 660, 661, of the Acts of 1903.

It is perfectly true, as insisted by counsel for the defendant in support of the first part of the demurrer, that *mandamus* will not lie while there is any other adequate remedy. It is likewise true that by this writ the court can only compel a judicial officer to take action on a matter within his jurisdiction, and cannot direct what judgment he shall render, but simply that he shall discharge his functions and render a judgment in some form in respect of the matter before him.

We are of the opinion that defendant's counsel er-

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roneously construed the allegations of the bill in respect of the nonaction of the county trustee. The substance of those allegations is that he issued the citation required by law; that it was served upon the defendant therein named, the Memphis Street Railway Company; that the latter came before the aforesaid officer, likewise the relator in behalf of the State; that the question of jurisdiction was argued; that the aforesaid county trustee, after hearing this matter argued, decided that he had no jurisdiction of the controversy, and refused to proceed further—that is, that he refused to hear the case on its merits.

Considering these allegations to be true, as the demurrer necessarily does, a clear case for granting the writ of *mandamus* was made. It is erroneously argued by the defendant's counsel that an appeal from this action of the county trustee lay to the State board of equalization under subsection 11 of section 38 of chapter 258 of the Acts of 1903. Under that subsection, the appeal lies only from the decision of the county trustee, or county court clerk, as the case may be, on the merits. The county trustee and the State board of equalization have *quasi* judicial powers, but these are carefully limited by the statute. It is not for either of these bodies to refuse to take jurisdiction of the matter clearly placed within their powers by the statutes of the State. It is for the regular courts of the State to decide what that jurisdiction is when any question arises thereon, and to compel them to take jurisdiction,

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by the writ of *mandamus*, when they improperly refuse to take such jurisdiction, and to restrain them by *certiorari* and *supersedeas* when they erroneously assume jurisdiction.

Moreover, the great weight of authority supports the proposition that "*mandamus* lies to compel an inferior court to hear and determine a cause or matter properly triable before it, which the lower court fails or refuses to try on the ground that it has no jurisdiction, or that the judge is incompetent, or for other reasons." 19 Am. & Eng. Enc. of L. (2 Ed.), 827, and authorities cited.

We shall now refer to a few of the authorities.

In *State, ex rel. Shannon, v. Hunter*, 3 Wash., 92, 27 Pac., 1076, it appeared that the return of the respondent to the alternative writ of *mandamus* showed that he had dismissed the suit in question for want of jurisdiction to hear it, because the amount sued for was less than \$100. The questions to be decided, and that were decided, arose upon this return. These questions were whether the court which refused jurisdiction had, in fact, jurisdiction where the sum sued for was less than \$100, and whether *mandamus* was the proper remedy where the cause was wrongfully dismissed, because in the opinion of the court it had no jurisdiction therein.

After deciding the first question in the affirmative, the supreme court of Washington continued:

"The superior court then erroneously dismissed the case, and the remaining question above suggested is

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as to the proper remedy. The position taken by the respondent is that such judgment of dismissal is the final judgment, and determines the cause as fully as would a judgment on the merits; that in rendering the same the court acts judicially and its discretion in so doing cannot be controlled by *mandamus*. There is much force in this position; and, if the question were a new one, unaffected by authority, we might come to the conclusion that the proper remedy in such a case was by appeal, not by *mandamus*, but the authorities seem to have established the other doctrine, and to have decided that from judgments of dismissal for want of jurisdiction no appeal will lie, but that the only remedy is by *mandamus*. This doctrine was established in the supreme court of the United States many years ago. In *Ex parte Bradstreet*, 7 Pet., 634, 8 L. Ed., 810, the supreme court of the United States issued a *mandamus* to a United States district judge to reinstate a cause which he had dismissed for want of jurisdiction, and to proceed in the trial of the same. In *Ex parte Parker*, 120 U. S., 737, 7 Sup. Ct., 767, 30 L. Ed., 818, the same court by writ of *mandamus* directed the supreme court of this territory to reinstate a cause which it had dismissed, because, in its judgment, it had no jurisdiction, and to proceed to hear the same upon its merits. The same doctrine was announced in 131 U. S., 221, 9 Sup. Ct., 708, 33 L. Ed., 123, where, in the same manner, the court commanded the supreme court of said territory to reinstate and hear a case, although the

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judges who had rendered the judgment of dismissal had gone out of office, and an entirely new set of judges had been installed. In *Harrington v. Holler*, 111 U. S., 796, 4 Sup. Ct., 697, 28 L. Ed., 602, the same court held directly that no appeal would lie upon a judgment of dismissal for want of jurisdiction rendered in the supreme court of this territory, and that the remedy, if any, was by *mandamus*. It will be seen from the above that the supreme court of the United States has from an early date uniformly held to a different doctrine from that contended for by respondents. If we look at the decision of the courts of last resort in the States, we shall find them to be almost uniformly upon the same side of the question. We shall not attempt to review these latter cases, but the case of *State, ex rel. Kcane, v. Murphy*, 19 Nev., 89, 6 Pac., 840, is the most interesting one upon this question. The learned judge of that court, in deciding said case, not only sustained the doctrine as above stated, but entered into a discussion of the reasons therefor with such success that there seems little chance of escape therefrom. He says that the discretion of the lower court is not controlled by such a writ; that the question as to whether or not such court has jurisdiction in the particular matter is a preliminary one; that the appellate court in granting the writ decides that question for the lower court, and does not compel it to decide it at all, and at great length elaborates and ably maintains the position contended for by the petitioner in this proceeding. In view

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of these authorities, we feel bound to hold that the proper remedy, where a cause has been erroneously dismissed for want of jurisdiction, is *mandamus*."

To the same effect, see *Richardson v. Farrar*, 88 Va., 760, 766-770, 15 S. E., 111; *State, ex rel. Chism & Boyd, v. Judge*, 34 La. Ann., 1177; *State, ex rel. Daniel Cohen, v. T. C. W. Ellis, Judge*, 41 La. Ann., 41, 6 South, 55.

In *State, ex rel. Daniel Cohen, v. T. C. W. Ellis, Judge*, it is said: "Relatively to the question of our jurisdiction to allow the relief now sought, it suffices to say that it is a settled rule, expounded by this court, that a distinction is recognized between cases in which it is sought by *mandamus* to control the decision of the inferior court on the merits of the cause and cases in which it has refused to go into the merits of the action, upon some erroneous construction of some question of law or practice, preliminary to the whole case."

In High on Ex. Rem., section 151, it is said: "A distinction is recognized between cases where it is sought by *mandamus* to control the decision of the inferior court, on the merits of the cause, and cases where it has refused to go into the merits of the action, upon an erroneous construction of some question of law or practice preliminary to the whole case."

Our cases upon the subject of *mandamus* are very numerous, but we have examined all of them, and find in none of them anything adverse to the rules laid down in the foregoing authorities.

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We should add, however, perhaps, by way of qualification, that probably where the point arises in one of the regular courts of the State on plea in abatement or motion raising a question of jurisdiction of the person or subject-matter, and there is a consequent dismissal of the case, with a judgment for costs, and wherein, under the course of our practice, an appeal lies, to test the correctness of the action of the lower court, *mandamus* would not be applicable, so, in other cases, in the regular courts of the State, where there is a dismissal of the action for want of jurisdiction, followed by a judgment for costs. But in the classes of cases just referred to there is a distinct judgment entered upon which an appeal may be prayed and prosecuted.

For the reasons stated, we are of the opinion that the grounds of demurrer, covering the whole bill, were not well taken, and should have been overruled by the chancellor.

We shall now consider the second division of the demurrer, which raises the question of the constitutionality of chapter 513, p. 1152, Acts 1905.

It is first objected by the State that there are no such officers as the State tax assessors referred to in the first section of that act.

This is a mistaken view. The first section of chapter 5, p. 102, Acts 1897, referred to in the first section of the above-mentioned act of 1905, provides for a board of State tax assessors to be appointed by the governor,

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in case at the same session of the legislature an act should not be passed creating a board of railroad commissioners, and, in case such act should be passed, then that the duties prescribed in chapter 5 should be devolved upon such railroad commissioners. In chapter 10, p. 113, Acts 1897, the board of railroad commissioners was created. Thereupon the members of that commission likewise obtained the title of State tax assessors, and the duties prescribed in chapter 5 of the acts of 1897 were devolved upon them *ex officio*.

It is insisted that the act of 1905 is but an amendment of the act of 1897, and, inasmuch as it does not recite the title or substance of the former act in its title or in its body, that it is unconstitutional, as in violation of the last clause of article 2 of section 17 of the State constitution. We think this is a mistaken view. The act does not purport to be, and is not, an amendatory act. It is an independent act, complete in itself. The officers referred to are simply given other duties, just as additional duties may be imposed by statute upon the sheriff, or coroner, or any other officer of the State created by the constitution or established by law. It could be considered at most, if an amendment at all, only as an implied amendment, and amendments of this character are not covered by the constitutional provision referred to. *Poe v. State*, 85 Tenn., 495, 3 S. W., 658; *Railroad v. Crider*, 91 Tenn., 506, 507, 19 S. W., 618; *State v. Yardley*, 95 Tenn., 558,

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32 S. W., 481, 34 L. R. A., 656; 1 Lewis' Sutherland, Statutory Construction, sec. 239. In the authority last cited it is said:

"Where an act does not purport to be amendatory, but is enacted as original and independent legislation, and is complete in itself, it is not within the constitutional requirement as to amendments, though it may, by implication, modify or repeal prior acts, or part thereof. The constitution does not make the obviously impracticable requirement that every act shall recite all other acts that its operation may incidentally affect, either by way of repeal, modification, extension, or supply. The harmony or repugnance of acts not passed with reference to the same subject can only be effectually developed by the clash of conflicting interests in litigation, and the settlement of such questions belongs to the judicial, not the legislative, department."

The next point made by the State will be sufficiently disclosed by the following observations:

If the said act of 1905 applies only to interurban lines and street railway companies whose lines extend beyond a single city, it is constitutional. If it applies to street railway lines confined to a single city and not extending beyond the boundaries thereof, it is unconstitutional, either in whole or in part, in accordance with its capability or incapability of subjection to a division of the subjects contained in it. It is perfectly clear that the method of taxation provided in the act is just and reasonable when applied to interurban lines.

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The reasons supporting this method of assessment, as applying to railway lines, running through more than one county, are fully stated in *Franklin County v. Railroad*, 12 Lea, 521, 534, 542, and need not be repeated here. The same reasons, we think, would apply to the property of a street railway company whose lines extend beyond the limits of a single city, even though they do not run to any other city. The reason is that the city should not tax so much of the line as runs beyond its limits, but only the values lying within it. In order to reach a true result in such a case, it is necessary that the division into distributable and localized property be made, as provided in section 7 of the foregoing act of 1897.

If we construe the act as applying to the lines of a street railway company confined to a single city, and not extending beyond the boundaries of such city, it would be unconstitutional, at least in part, since no good reason could be assigned for such a classification, or why street railway companies of this description should be subjected to a mode of taxation different from that applied to electric light companies and water companies, provisions concerning the assessment of which appear in sections 22, 24, c. 258, pp. 646, 651, Acts 1903.

It is our duty to construe the act in such way as to hold it constitutional, if we can do so in accordance with sound reason. We are of the opinion that the present act can be so construed, and that it applies only to in-

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terurban lines and street railway lines extending beyond the boundaries of a single city. This is apparent from sections 3 and 7.

It is insisted that what is said in section 3 concerning electric light and power properties introduces a new subject, and makes the act void, as in violation of article 2, section 17, of the constitution, which provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. It is also said that this provision is in violation of article 11, section 8, of the constitution, because it makes an unreasonable classification, in favor of electric light plants owned by street railway companies, as against independent electric light plants. The reason given for this objection is that independent plants must be taxed as set out in sections 22, 24, c. 258, pp. 646, 651, Acts 1903, while under the present act an electric light plant owned by a street railway company whose lines extend beyond the city obtains the deduction in value which must necessarily arise from the division of the sum of valuation within the city by the whole mileage of the street railway company extending beyond the city, while no such deduction is possible under the provisions made for other electric light companies. We think the objection is valid, and that so much of this act as makes provisions for the assessment of electric light plants owned by street railway companies is unconstitutional. However, this does not make the whole act void, since this subject is easily separable from the body of the act,

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leaving the residue unimpaired. *State, ex rel., v. Trehitt*, 113 Tenn., 561, 82 S. W., 480.

The same is true of so much of the last section as refers to the back assessment of railroads, telephones, and telegraph companies (in the last clause of section 18) objected to by counsel for the complainant. These subjects are wholly foreign to the title of the act, but may be elided without impairing the integrity thereof. We can have no doubt that the legislature would have passed the act with both of the objectionable features referred to left out. *State, ex rel., v. Trehitt*, supra; *State v. Wilson*, 12 Lea, 246, 254.

A criticism is made upon the act to the effect that section 18 speaks only of street railroads. However, it is clear that construing the whole act together it was intended by the legislature in this section to cover, not only street railroads, but interurban railroads as well.

There are other criticisms of the act made by counsel which we have carefully considered and found not well made, but do not deem them of sufficient importance to merit a more particular reference here.

It does not appear from the allegations of the bill whether the lines of the Memphis Street Railway Company extend beyond the limits of the city of Memphis or not; and so it does not appear from the bill whether the lines of the company referred to fall within the act which we have above held constitutional or not. We

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cannot presume that the officers of the State acted illegally.

It follows that the contention of the State, with respect to the year 1905, must be disallowed.

However, as to the years 1902, 1903, and 1904, the complainant is entitled to relief for the reasons already given.

The next and last question is whether the court shall permit a return to the alternative writ, or whether a peremptory writ shall be ordered to issue at once.

In Merrill on Mandamus, after stating the older and harsher practice, the author continues:

"The custom now is, if the demurrer to or the motion to quash the alternative writ is overruled, to allow the respondent to put in a return. This is not conceded to be a matter of right, but is considered proper when justice requires that the respondent should be allowed to answer. Sometimes the court has required the respondent to submit to it his proposed answer, or to show the merits of his defense by an affidavit, or has received the oral statements of his counsel in lieu of an affidavit. In such cases, if the court considered the proposed defenses to be without merit, or that they had already been passed on in the decision of the demurrer, or motion to quash, the respondent was not allowed to make a return and a peremptory writ was ordered."

No suggestion has been made that the bill stated incorrectly the facts in respect of the county trustee's refusal to take jurisdiction of the controversy. The

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cause will be remanded to the chancellor, with directions to issue at once a peremptory writ, directing the county trustee to take jurisdiction of the controversy, and proceed to hear it in respect of the taxes of 1902, 1903, and 1904.

The costs of this cause will be paid by the defendant.

ON REHEARING.

This case was before us on a former day of the term, and is now before us again on petition to rehear, and to modify our former opinion, in so far as it refers to section 3, c. 513, p. 1153, Acts 1905, in relation to the electric-lighting business of street railway companies. It is said that the Memphis Street Railway Company, whose property is under consideration in the present case, is engaged in no such lighting business, hence that the question does not arise here and should not be disposed of in the opinion; and that what was said in the former opinion will unnecessarily and unjustly affect the business of other companies that are not before the court, and that have no opportunity to be heard. Furthermore, it is said that the business of electric lighting, in respect of those street railway companies that are so engaged, is so intermingled with their street railway operations that they cannot be separated for the purposes of assessment, so as to reach any just result, either to the State or to the companies so engaged.

It is, of course, a matter to be regretted that the decision of a case as a result of the enunciation of the

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principles upon which it is based, always affects, indirectly at least, the rights of people not before the court; but this is a necessary infirmity, or incident at least, of all judicial proceedings which the wisdom of man has never been able to cure or change. We do not agree with counsel that it is unnecessary in the present case to consider the provisions of section 3, c. 513, p. 1153, Acts 1905, so far as they relate to electric lighting. It is necessary to pass upon that part of it which refers to electric lighting, because the attorneys for the complainant have challenged that particular feature of the act as introducing a new subject, and making the whole act void as in violation of article 2, section 17, of the constitution, and also as in violation of article 11, section 8, of that instrument. In the former opinion the conclusion was reached that the provision referred to constituted a separate subject, but might be elided, as merely incidental, under the rule as laid down in *State, ex rel., v. Trechitt*, 113 Tenn., 561, 82 S. W., 480, and *State v. Wilson*, 12 Lea, 246, 254, and other cases, leaving the residue of the act to stand. I am still of that opinion, but the majority of the court have reached a different conclusion on the following grounds, in which I concede that there is great force.

The statute under which street railway companies, and interurban companies are authorized to engage in the business of electric lighting, is chapter 406, p. 1150, Acts 1903. The first section of that act reads as follows:

"Section 1. Be it enacted by the general assembly of

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the State of Tennessee, that sections 6 and 13 of the act entitled 'An act to provide for the organization of corporations,' approved, March 23, 1875, being chapter 142 of the acts of 1875, be so amended that railroads and railway companies constructing, owning, and operating with electricity interurban railroads and street railroad companies, shall have and be invested with the following additional rights and powers to wit: To manufacture, generate and distribute electric light, electric heat and electric power for the purpose of supplying themselves and others; to construct, equip and own factories, plants, machinery and all appliances for the manufacture, generation and distribution of electric light, power and heat; to acquire, by purchase, lease, or other lawful contract, electric plants, factories, machinery and all appliances for the manufacture, generation and distribution of electric light, power and heat; to acquire by purchase, lease or other lawful contract, electric plants, factories, machinery, equipments, and appliances, and rights, easements, licenses and franchises, necessary or convenient to manufacture, generate, distribute and sell electric light, power and heat; to supply and sell to others electric light, power and heat; to acquire by purchase, lease or other lawful contract, water power, riparian and water rights together with all such licenses and franchises, easements, and privileges attached to, necessary or convenient to operate and use the same; and to have and possess all such other powers as shall be necessary

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to execute and perform the powers hereinbefore granted."

Section 3, c. 513, p. 1153, Acts 1905, reads as follows:

"Sec. 3. Be it further enacted that every person, or corporation, owning, leasing, or operating interurban and street railroad properties, including electric light and power properties when owned or operated in conjunction with street railroad properties shall file with the comptroller of the State biennially on or before the first day of April, commencing with 1905, a schedule or schedules stating and giving the following facts and information, viz: A list or statement of all of his or its property, real, personal, and mixed, owned or leased, setting forth therein the length in miles of the entire roadbed, switches, and side tracks showing the number of miles in each county, and the number of miles in each city, or incorporated town, the value of the whole, the amount of capital stock controlled by the corporation, the bonded debt, the gross annual receipts of the preceding fiscal year, the number of cars, their classes and value, the location, description, and value of all car sheds, transfer stations, power houses, and other real estate, and all real, personal, and mixed property belonging to the person or company owning said railroad, if a part of, and used in connection therewith, together with its value."

Upon further consideration of the matter, and construing the foregoing section in connection with section

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1 of the above-mentioned chapter 406 of the Acts of 1903, the majority of the court are of opinion that the language upon the subject of electric lighting appearing in the foregoing section of the Acts of 1905, viz., "including electric light and power properties when owned or operated in conjunction with street railroad properties," applies only to the case of electric lighting operations arising solely from the running of an electric railway plant as a railway, and to the sale of its surplus electricity so generated, and does not cover the case of a street railway company, or interurban company, owning and operating a separate electric light plant, or a plant run under chapter 406 of the Acts of 1903 for the purpose of conducting the business of electric lighting; and, in this view, that the provisions of section 3, c. 513, p. 1153, Acts 1905, upon the subject of electric lighting, do not constitute a separate subject in violation of article 2, section 17, of the constitution, and that so construed, the aforesaid section 3 of Acts of 1905 is not in violation of article 11, section 8, of the constitution. What would be the result in the case of a distinct plant owned or leased and operated by an electric railway company, and not an integral part of its railway business, the court thinks does not arise in the present case, and need not be considered.

ON MOTION TO MODIFY ORDER.

After the original opinion was handed down in this case on the 20th of June, an application was made by de-

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fendant's counsel for a modification of the order directed in the last paragraph upon the subject of the issuance of a peremptory *mandamus*, so as to permit the filing of an answer upon the remand to the chancery court. This was opposed by counsel for complainant, and the court finally settled the particular controversy thus arising by entering an order granting to the defendant ten days from the adjournment of the court within which to file an affidavit setting forth the defense which he desired to incorporate in the answer which he proposed to file. This course, sanctioned by the authority cited in the original opinion, was adopted with the view, on the one hand, of avoiding the possibility of shutting off a just defense, and, on the other, of guarding against unnecessary delay in the hearing of the controversy which the court had held it was the duty of the county trustee to take jurisdiction of and to hear.

Within the ten days granted the defendant filed his affidavit, stating his grounds as follows:

"That at the time the matter of the assessment of said street railway was taken up before him, as a *quasi* judicial officer, affiant was informed and ascertained as a fact during his investigation into the facts of said back assessment for the years 1902, 1903, and 1904 that the Memphis Street Railway Company had been regularly assessed by the assessor of Shelby county, that said assessment had been reviewed by the county board of assessors for Shelby county, and that an appeal had been

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taken from the said county board to the State board of equalization, and that said appeal had been acted upon, and that an assessment had been finally made on said street railway company by said State board under said appeal. This affiant, then acting as a *quasi* judge and construing the law and the acts of the legislature as best he could, deemed himself bound by the assessment of said State board for said years. He thereupon ruled that the assessment made by the State board was a finality, and that he acting in said *quasi* judicial manner was bound thereby, and that he was without jurisdiction to proceed further in the matter of said assessment.

“Under citation served on the Memphis Street Railway Company, the following facts among others were disclosed during the examination for the respective years:

“1902. For the year 1902 the Memphis Street Railway Company appealed from the assessment of the assessor to the county board of equalization, and the county board of equalizers assessed the corporate property of the Memphis Street Railway Company at and for the sum of \$980,000. From this assessment the State of Tennessee and the county of Shelby appealed to the State board of equalization, and this board assessed said property at and for the sum of \$1,700,000. Affiant further found as a fact that the State board of equalization did during September, 1902, certify this fact to the county clerk of Shelby county, Tennessee.

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"1903-04. The county assessor, in the years 1903-04, following the action of the State board of equalization for the year 1902, assessed the property of the Memphis Street Railway Company for each of these years at and for the sum of \$1,700,000. The county board of equalizers reviewed the assessment for the year 1903, and also for the year 1904, and approved these assessments for both years. The State board of equalizers for both of these years approved the finding of the county board of equalization, and placed the assessment for each year at the sum of \$1,700,000.

"Affiant further found that the assessment acts of 1901 and 1903, in section 33 of each act, provided as follows: 'When the county board of equalizers shall have determined the matters of equalization and value before it, and within its jurisdiction, such action shall be final except in so far as the same may be reviewed or changed by the State board of equalization.' Also under Acts 1901, p. 346, section 38, subsec. 10, this language is used: 'The action of the State board of equalizers shall be final and conclusive as to all matters passed upon by the board, and taxes shall be collected upon the values so fixed and found by said board.' The same identical language is used in Acts 1903, p. 674, c. 258, section 38, subsec. 10. This condition of facts, together with the law which your affiant presumed to be applicable to his action in the premises, constrained affiant to hold that the assessment of the State board of equalization was final, and that affiant was without jurisdiction, and

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had no authority to make the assessment against said properties as requested."

There are other averments in the affidavit, covering the year 1905; but, as the controversy in respect of that year has been eliminated, we need not further refer to this portion of the affidavit.

The defense sought to be interposed as to the assessment for the years 1902, 1903, and 1904 is, in short, that, inasmuch as the State board of equalization had acted upon the assessments for each of these years, and subsection 10, above quoted, declares that the action of that board shall be "final and conclusive," there can be no back assessment, or reassessment, under section 31 quoted in the original opinion.

We shall now examine this position.

In order to properly determine the matter, we shall have to construe sections 31 and 38 of the said chapter 258 of the Acts of 1903; and, in doing so, we shall at the same time construe the act of 1901 referred to, since they are in respect of this matter the same.

In the original opinion section 31 is set out in full. By reference to that section, it will be seen that beyond doubt five cases are stated (subsections 1 to 5, inclusive) in which back assessments may be made. It is unnecessary to consider whether an additional ground is given in subsection 6. It is perceived that in three of the five instances (subsections 2, 3, 4) a case is supposed in which the board of equalization has already acted. So that, if subsection 10 of section 38, quoted in the affi-

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davit, has a universal application—that is, admits of no exception to the generality of its language—sections 31 and 38 are directly in conflict. But the dictate of common sense, as well as the letter of the law, is that the several parts of an act must be considered together, and so construed as to accomplish harmony between them, if that can be done.

In the original opinion we quoted subsection 11 of section 38. Turning to the language there quoted, it will be observed that the duty is devolved upon the State board of equalization to hear appeals upon matters of back or reassessment made by revenue agents or other officers of the State from county trustees or county court clerks; that the right of appeal from the decision of the county trustees, or county court clerk, as the case may be, in back assessment cases heard by them, or either of them, is given to the State, the county, and also to the taxpayer or citizen whose property has been reassessed, and that it is made the duty of the State board to hear the matter in controversy. This subsection 11 immediately follows subsection 10 quoted in defendant's affidavit. Reading these two subsections of section 38 together, there can be no sort of doubt that, whatever may be the scope of subsection 10 in respect of the finality or conclusiveness of the action of the State board, it cannot extend so far as to exclude cases of back assessment or reassessment authorized by other parts of the act, but as to such matters they are to be treated as exceptions to the rule of finality expressed in

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subsection 10. Indeed, so careful was the general assembly to make sure the right and power of back assessment or reassessment in the special cases provided for, that it was declared in subsection 5 of section 38 that the State board during its biennial session, "or at any other time," "shall have the power to send any of its members to any portion of the State to obtain information and evidence deemed material, and to hear questions upon appeal from the action of trustees and county court clerks." The subsection continues: "In cases of back assessments and re-assessments, to the duties of equalization, said board, whenever deemed material, may hold at any time, sessions at said capitol or elsewhere for the transaction of business, other than that to be performed during the biennial sessions, which sessions may be held either before or after said biennial sessions," etc. The lawmaking body returns to the subject again in section 39, wherein it is declared that the assessments provided for in section 31 (that is, back assessments) shall not be made for any year other than "for the year in which said assessments shall be made, and for three years preceding same." So, if there is anything in the act wholly outside the field of doubt and speculation, it is that it was the purpose of the legislature to provide for back assessments in proper cases; but there never could be a back assessment if the action of the State board were final, in the sense suggested in defendant's affidavit, on the ground that it had passed upon and settled the original assessment, either under

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its general operation as a board of equalization or on the exception of some taxpayer to the action of the county board; since the State board in one or the other of these methods passes upon all original assessments. The act provides (section 33) that all assessments shall go before the county board of equalizers. From this board they are passed on to the State board. Chapter 258, at pages 666, 667, 670, Acts 1903. The functions of the county board are triplicate—the primary one to equalize the assessments over the whole county; a secondary, or at least an additional, one, to hear complaints of individual taxpayers, either that the property of other taxpayers or of some other taxpayer is assessed lower than his own, or that his property is assessed too high, or the board may of its own motion raise or lower any assessment so as to place the property at its actual cash value. Acts 1903, pp. 665, 666. But the county board cannot raise any particular assessment until the property owner or owners affected by the increase shall have been notified and given an opportunity to be heard. *Id.*, p. 665. When the county board of equalizers shall have determined “the matters of equalization and values, before them, and within their jurisdiction,” such action, the statute provides, “shall be final, except in so far as the same may be revised or changed by the State board of equalization.” *Id.*, p. 667. The functions of the State board are in the main substantially the same as those of the county board, modified by the fact that the scope of its operations is wider, and that it does not en-

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tertain original complaints of individual taxpayers except in the one instance below mentioned. The primary duty of the State board is to equalize the assessments in the several counties over the whole State, so as to make them conform to the standard of the actual cash value of the properties involved; in performing which duty equalization may be made by classification of properties by wards, civil districts or counties, or in such manner as may be deemed best to enable the board to justly and equitably equalize assessments in conformity with the standard of actual cash value. Id., p. 673. This is the main work of the biennial session. Pages 672, 673. But at this session the board may hear the original complaint of an individual taxpayer that other property than his own has been assessed at less than its actual cash value; and, as incidental to its power to re-examine, or review the work of the county board, it may re-examine complaints of this character made in that board, as well as the action of that board upon the complaints of individual taxpayers as to the valuation of their property. This power is found in the general duty of equalization (section 38, *passim*), and also in that portion of section 33 which provides that the matters of equalization and values before the county board, and within its jurisdiction shall be final, "except in so far as the same may be revised or changed by the State board of equalization." Page 667. Another important function of the State board is to hear appeals from the decisions of county trustees and county court clerks in the matter of back

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assessments. Section 38, subsec. 11; also, subsection 5, pp. 673, 676. Now, going back and stating in outline the process of assessment from the beginning to its completion, we have, first, the assessments made by the county and district assessors. Sections 13 to 18; sections 21 to 26. Then follow in regular order the duty of the assessors to turn over their assessment lists and books to the county court clerk (section 19), the requirement that the county court clerk shall turn over to the county board of equalization the assessment lists or rolls at its first day's session for its consideration (section 33, p. 665), the provision that the county board of equalization shall upon the completion of its labors deposit its records and papers, together with the assessment lists with the clerk of the county court for preservation (*Id.*), and shall furnish a summary of its work together with a tabulated statement of certain data, to the State board of equalization (pages 666, 668, 670), then the performance by the latter of its duties in the valuation and equalization of property, as above mentioned (section 38, *passim*), and finally the certification by that board to the several county court clerks, showing corrections and changes in assessments, and the increases and decreases in the value of property, and the duty of the county court clerks to make proper and correct entries of these matters upon the tax books, to be turned over to the county trustee (page 674). Thus, it is perceived, all of the assessments come before the State board in regular course. Such changes as they

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make in individual assessments they make in the course of the regular routine. No appeal is provided from the county board to the State board. None is needed. Objections made in the county board can be followed into the State board, and there renewed under forms and methods the latter may prescribe pursuant to subsection 4 of section 38. From all this, it is clear there is no trial in the sense of a litigation between contending suitors, but merely the means and methods provided for an administrative branch of the public service to enable it to reach a correct result in the assessment of property. No notice to the taxpayer is required, but he must take notice from the statute itself of the biennial session. Page 672. But, when the machinery is put in motion to back assess the property of a citizen, a marked change is noted. He must be served with a personal citation to appear before the county trustee (or county court clerk, as the case may be) and show cause, if any he has, "why said property should not be back assessed or reassessed at its actual cash value." Page 662. Under this citation a regular trial is had before the county trustee (or before the county court clerk, in the case of merchants' taxes), as a result of which he is to render a decision, fixing the rights of the parties, from which an appeal may be prayed and prosecuted by either party to the State board of equalization (subsection 11 of

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section 38, p. 674), "whose duty it shall be to hear the matter in controversy." *Ib.* Now, it is clear that subsection 10 of section 38, viz., "The action of the State board of equalizers shall be final and conclusive as to all matters passed upon by the board, and taxes shall be collected upon the valuations so fixed and found by said board," has quite a different meaning from that suggested in the affidavit. It means, indeed, that these valuations are not to be interfered with or changed by any other tribunal or court. It does not mean that the power of the State board is limited thereby; that is, it does not mean that when the State board shall have acted upon the valuations in the course of its ordinary routine in reviewing the work of the county board, that it (the State board) shall thereby cut itself off from a re-examination of particular assessments under proceedings instituted for procuring back assessments. To so hold would be to nullify every provision in the act upon the subject of back assessments. It is indeed true that the legislature intended to declare in subsection 10, *supra*, that whenever the State board had finally passed upon the assessments, under all of the powers conferred upon it, whether through its routine work of equalization at its biennial session, or subsequent proceedings for back assessment, this should be an end of the matter.

The learned counsel for defendant do not go so far in their brief as the defendant goes in his affidavit. In the brief it is said:

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"Now, we earnestly submit that subsection 10 is a general provision, and as aforesaid applies absolutely and unequivocally to all matters that have been passed upon by the State board of equalization. However, section 31 is a special provision applying only to the enumerated class of cases mentioned therein, and therefore in our opinion a proper construction of these two sections taken together is that all matters concerning the valuation of properties when passed upon by the State board of equalization are final, except in those cases which are mentioned in section 31, and which are exceptions to the general rule of finality."

This construction is assented to in the reply brief of complainant's counsel.

It is perceived that it is the same in substance as that reached by the court upon an extended review and comparison of all of the provisions of the statute applicable.

So, the court and the counsel upon both sides are at one on the proposition that proceedings for back assessments falling within the provisions of section 31 are in nowise precluded by the provisions of subsection 10 of section 38, but may be instituted and carried to a conclusion under section 31 and subsection 11 of section 38.

This would seem to end the controversy by a general accord. Counsel for defendant, however, insist that the case before us does not fall within the several grounds for back assessment, or any of them, set forth

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in section 31. But counsel are precluded from making this point by the language of the original opinion in this cause. In that opinion we said:

"Before directly taking up for consideration the points in the demurrer, we deem it proper to say that we think the facts stated in the bill, which we have set out, make out a case for the jurisdiction of the county trustee to reassess or back assess the property of the Memphis Street Railway Company, within subdivisions 2, 3, and 5 of section 31, above set out, of chapter 258 of the Acts of 1903."

That determination cannot be reopened after the close of the term, nor could it be at any time made in the form of the present application. Besides, we are content with it as it stands, believing it to be perfectly sound and just.

In view of the construction given to the act, and our holding that the controversy as set forth in the bill falls within the provisions of section 31, no other conclusion is possible than that a proper case was stated for the jurisdiction of the county trustee; that the affidavit fails to show any reason why he should not take jurisdiction and proceed with the hearing of the case; in short, that it appears the defendant has no valid defense to offer against the issuance of the peremptory writ of *mandamus*, and the same order must be made upon this subject which was directed to be made near the close of the original opinion.

There is nothing in the numerous authorities cited

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in defendant's brief that gainsays the conclusion we have reached. The whole matter turns upon the construction of our statute.

The question is argued in the brief of defendant's counsel whether subsection 6 of section 31 of the act merely provides the means by which relief is to be had under the several grounds set out in subsection 1 to 5, inclusive, or whether, in addition, it contains a sixth ground, viz., the mere fact that the property was not originally assessed at its actual cash value. The defendant's counsel insist that the former is the correct view, and that the latter is wholly inadmissible. The complainant's counsel insist that the case presented by the bill is one of an undervaluation so gross as to place the subject-matter in the category of omitted property. We deem a consideration of these questions out of place here, since, as already stated, it was held in the original opinion that the bill made out a case under subsections 2, 3, and 5, of section 31 of chapter 258 of the Acts of 1903, and the affidavit filed by defendant under permission given at the last term shows no reason why he should not take jurisdiction and proceed to the discharge of his duty in the hearing and determination of the cause brought before him.

Let the order as above indicated be made for a remand to the chancellor with the direction to issue a peremptory *mandamus*.

The defendant will pay the costs of this proceeding.

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MEMPHIS STREET RAILWAY COMPANY v. WILLIAM G. BYRNE.

(*Jackson*. Special September Term, 1907.)

1. CONSTITUTIONAL LAW. Provision as to the oneness of the subject to be expressed in the title is mandatory.

The constitutional provision (art. 2, sec. 17) that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title," is mandatory. (*Post*, pp. 286, 287.)

Case cited and approved: *Cannon v. Mathes*, 8 Heisk., 519.

2. SAME. Object of provision as to the oneness of the subject to be expressed in the title; liberal construction.

The object of the constitutional requirement (art. 2, sec. 17) as to the oneness of the subject to be expressed in the title of each bill is to give notice of the nature of the proposed legislation and to prevent surprise and fraud in the enactment of laws, and to prevent improper and unlawful combinations between the members of the general assembly, resulting in the passing of statutes having no natural connection. However, this provision is to be liberally construed so as not to unnecessarily embarrass legislation. (*Post*, pp. 287, 288.)

Cases cited and approved: *Cannon v. Mathes*, 8 Heisk., 519; *Luehrman v. Taxing District*, 2 Lea, 428; *Morrell v. Fickle*, 3 Lea, 81; *Truss v. State*, 13 Lea, 312; *Frazier v. Railroad*, 88 Tenn., 158.

3. SAME. A "general title" of an act defined.

A "general title" to an act is one which is broad and comprehensive, and covers all legislation germane to the general subject stated. The title may cover more than the body, but it must not cover less. It need not index the details of the act nor give a synopsis thereof. (*Post*, pp. 288-291.)

Cases cited and approved: *Cannon v. Mathes*, 8 Heisk., 519; *State v. Yardley*, 95 Tenn., 555; *State, ex rel., v. Brewing Co.*, 104 Tenn., 718.

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4. SAME. A "restrictive title" of an act defined.

A "restrictive title" to an act is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation, and under such a title, the body of the act must be confined to the particular subject expressed in the limited title. (*Post*, pp. 289-291.)

Cases cited and approved: *Hyman v. State*, 87 Tenn., 109, 112, 113; *State v. Bradt*, 103 Tenn., 591; *State, ex rel., v. Brewing Co.*, 104 Tenn., 718.

5. SAME. Rules as to the oneness of the subject to be expressed in the title apply to amendatory statutes.

The rules as to the oneness of the subject of legislation to be expressed in the title apply to amendatory statutes. Such a statute incorporates itself with the original law, and the two become one statute, as fully and completely as if enacted at one time in one bill, and the matter of the amendment must not only be germane to the body of the original act, in order to avoid violating the one subject mandate of the constitution, but, in the absence of an enlargement of the title of the latter act, it must come within the title of the original statute and be germane to the subject there expressed, in order to comply with the other mandate that the subject be expressed in the title. If it be otherwise in either particular, it is void. (*Post*, p. 291.)

Cases cited and approved: *Hyman v. State*, 87 Tenn., 109; *Goodbar v. Memphis*, 113 Tenn., 23.

6. SAME. Rule favoring the construction to sustain the statute applies to the title.

The rule of construction that every intendment and presumption is in favor of the constitutionality of a statute, and that every doubt must be solved so as to sustain it, and where it is subject to two constructions, that which will sustain its constitutionality must be adopted, is applicable in the interpretation of titles. (*Post*, pp. 291, 292.)

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Cases cited and approved: *Manufacturing Co. v. Falls*, 90 Tenn., 466; *State, ex rel., v. Brewing Co.*, 104 Tenn., 718.

7. STATUTES. Preamble considered in ascertaining the intention of the legislature.

The preamble of a statute, while not a part of it and not controlling, may be considered in connection with the condition of public affairs, contemporary history, and other statutes in relation to the same subject-matter, in ascertaining and determining the intention of the legislature. (*Post*, p. 297.)

Acts cited and construed: Acts 1895, ch. 76.

Case cited and approved: *McElwee v. McElwee*, 97 Tenn., 658.

8. SAME. Amendment of statute creating court of chancery appeals so as to create the court of civil appeals.

Acts 1895, ch. 76, creating the court of chancery appeals and defining its jurisdiction, and Acts 1907, ch. 82, amending the former act so as to change the name of the court to that of the court of civil appeals and to increase its jurisdiction, relate to but a single subject, are germane, and the latter act is a proper amendment of the former. Both acts have but one general object or purpose, one single subject, however multitudinous may be the means or instrumentalities provided for effecting that purpose. (*Post*, pp. 292-300, and especially 299, 300.)

Acts cited and construed: Acts 1895, ch. 76; Acts 1907, ch. 82.

Cases cited and approved: *Cannon v. Mathes*, 8 Heisk., 504; *Morrell v. Fickle*, 3 Lea, 79; *Frazier v. Railroad*, 88 Tenn., 157; *State v. Brown*, 103 Tenn., 449; *State v. Hamby*, 114 Tenn., 364.

9. SAME. Object and purpose of an act is the same as the subject thereof.

The object and purpose of an act, as a general thing, is the subject of it, in the sense of the mandate of the constitution (art. 2, sec. 17), as to the subject of legislative bills. (*Post*, p. 300.)

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10. **SAME.** Same. Subject of act creating court of chancery appeals covers subject of the amendatory act creating the court of civil appeals.

The subject expressed in the title of Acts 1895, ch. 76, creating the court of chancery appeals, is sufficiently broad and comprehensive to cover the common object and purpose of itself and of Acts 1907, ch. 82, amending the former so as to create the court of civil appeals. (*Post*, pp. 300-310.)

Acts cited and construed: Acts 1895, ch. 76; Acts 1907, ch. 82.

Cases cited and approved: *Cannon v. Mathes*, 8 Helsk., 504, 519; *Morrell v. Fickle*, 3 Lea, 79; *Jackson v. Nimmo*, 3 Lea, 597; *Truss v. State*, 13 Lea, 312; *Ryan v. Terminal Co.*, 102 Tenn., 127; *State v. Brown*, 103 Tenn., 449.

11. **SAME.** Name or style of a court does not limit or confine its object or jurisdiction.

The name or style of a court does not limit the object of the court or the jurisdiction to be conferred upon it. There is a broad distinction between the purpose to create a court and the jurisdiction to be conferred upon that court, and the two must not be confused. (*Post*, pp. 301, 311.)

Case cited and approved: *Jackson v. Nimmo*, 3 Lea, 597.

12. **SAME.** Acts 1907, ch. 82, amending Acts 1895, ch. 76, does not depend upon title of original act, but upon its own title.

The validity of Acts 1907, ch. 82, amending Acts 1895, ch. 76, which created the court of chancery appeals, by increasing the size and jurisdiction of such court and changing its name, does not depend upon the scope of the title of the original act, but upon its own title. (*Post*, p. 307.)

13. **SAME.** Restrictive title of original act may be amended and enlarged by title of amendatory act.

While a general title covering one entire subject cannot be enlarged by an amendatory act so as to include another subject or additional matter, because thereby two subjects would be introduced in the body of the act, nevertheless, a restrictive

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title may be enlarged by the title of an amendatory act, so as to allow legislation germane to the body of the original act. If the title of the original act could have been broad enough to cover the matter of the amendment, the title of the amendatory act may so amend it, on the principle that whatever could have been done originally can be done by amendment. (*Post*, pp. 307-310.)

Cases cited and approved: *Hyman v. State*, 87 Tenn., 109; *State v. Algood*, 87 Tenn., 163; *Goodbar v. Memphis*, 113 Tenn., 35; *Galloway v. Memphis*, 116 Tenn., 747.

14. **SAME.** Amendment contained in Acts 1907, ch. 82, as to court of chancery appeals is properly expressed in its title.

The subject of the amendment contained in Acts 1907, ch., 82, amending Acts 1895, ch. 76, which created the court of chancery appeals, so as to increase the number of judges of the court, to change its name, and to increase its jurisdiction, and further limit the jurisdiction of the supreme court, was properly expressed in the title of the amendatory act. (*Post*, p. 310.)

15. **SAME.** Acts 1907, ch. 82, is amendatory as to court of chancery appeals, and does not create a new court.

While Acts 1907, ch. 82, changes the name of the court of chancery appeals, increases its judicial force, increases its jurisdiction and powers, and provides for their exercise in a manner which that court could not exercise under the act creating it, still said act is not an independent and complete scheme of legislation, and does not establish a new court. (*Post*, pp. 311-315.)

16. **SAME.** Implied repeals are not favored.

Acts 1907, ch. 82, is amendatory as to court of chancery appeals, created by Acts 1895, ch. 76, and is not in irreconcilable conflict with the said prior act, and does not repeal it by implication. (*Post*, pp. 314-317.)

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Cases cited and approved: *Frazier v. Railroad*, 88 Tenn., 163; *Fisher v. Baldridge*, 91 Tenn., 418; *Blaufeld v. State*, 103 Tenn., 593; *McCampbell v. State*, 116 Tenn., 107.

Case cited and distinguished: *Malone v. Williams*, 118 Tenn., 390.

17. SUPREME COURT. Jurisdiction and powers under the constitution.

The supreme court, established and vested with its jurisdiction and powers by the constitution, not to be interfered with by the other branches of the government, is the highest judicial tribunal in the State. Its adjudications are final and conclusive upon all questions determined by it, save those reserved to the supreme court of the United States for review by it. (*Post*, p. 320.)

Cases cited and approved: *Miller v. Conlee*, 5 Sneed, 432; *Dodds v. Duncan*, 12 Lea, 731; *State v. Gannaway*, 16 Lea, 124.

18. SAME. Same. Jurisdiction is appellate only with power to enforce that jurisdiction.

The jurisdiction of the supreme court is appellate only, with the power to enforce that jurisdiction. (*Post*, p. 320.)

Constitution cited and construed: Art. 6, sec. 2.

Cases cited and approved: *State v. Bank*, 5 Sneed, 573; *Memphis v. Halsey*, 12 Heisk., 213; *State v. Gannaway*, 16 Lea, 124.

19. SAME. Supreme court's ultimate revisory power cannot be unreasonably interfered with.

The legislature may, by the establishment of courts of intermediate appellate jurisdiction, or other appropriate legislation, limit and restrict the right of litigants to resort to the supreme court of the State, and regulate the mode of doing so, but not so as to interfere unreasonably with, or to embarrass, its ultimate revisory powers; and it is always for the supreme court to decide when its constitutional jurisdiction is encroached upon. (*Post*, pp. 320, 321.)

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Cases cited and approved: *Miller v. Conlee*, 5 Sneed, 432; *State v. Bank*, 5 Sneed, 573; *Ward v. Thomas*, 2 Cold., 565; *Newman v. Scott Co.*, 1 Heisk., 787; *Hundhausen v. Insurance Co.*, 5 Heisk., 704; *Chestnut v. McBride*, 6 Bax., 95; *McElwee v. McElwee*, 97 Tenn., 657; *Chattanooga v. Keith*, 115 Tenn., 589.

20. COURT OF CIVIL APPEALS. Appellate jurisdiction defined.

The primary appellate jurisdiction of the court of civil appeals embraces all cases brought up from courts of equity and chancery courts, involving not more than one thousand dollars, and all cases brought up from the circuit and common law courts, except cases involving constitutional questions, election contests, and State revenue and ejectment suits. (*Post*, pp. 317-333.)

Acts cited and construed: Acts 1907, ch. 82, sec. 7.

21. SAME. Same. Appellate jurisdiction in supreme court in case involving constitutionality of statute creating court of civil appeals.

When the constitutionality of the statute creating the court of civil appeals is involved in an appeal that would otherwise lie to that court, the appeal may be taken directly to the supreme court, and it may there be tried and finally determined. (*Post*, pp. 317, 318, 334-339.)

 FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County.—A. B. PITTMAN, Judge.

J. C. BRADFORD and E. E. WRIGHT, for Railroad.

BELL, TERRY, ANDERSON & BELL, for Byrne.

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MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is an action brought by William G. Byrne against the Memphis Street Railway Company in the circuit court of Shelby county to recover damages for the alleged wrongful action of the defendant in refusing to transport him upon one of its cars.

The right of the plaintiff to recover depends upon the constitutionality of a statute of Tennessee, which is assailed by the defendant. The case was tried March 30, 1907, and there was a verdict and judgment in favor of the plaintiff for \$50, and the defendant prayed and was granted an appeal in the nature of a writ of error to this court. The case is now before the court upon a motion, joined in by both parties, to have it docketed and here tried and determined.

The question now presented is one of jurisdiction. The trial and judgment in the circuit court were had after chapter 82 of the Acts of 1907, amending chapter 76 of the Acts of 1895, creating the court of chancery appeals, was enacted and approved. By that statute the name of that court was changed to the "court of civil appeals," the number of its judges increased to five, and its jurisdiction extended, among other things, to the review of civil cases tried in the circuit and common-law courts of the State. The parties, however, insist that they have a right to a trial in this court upon direct proceedings in error, without resort primarily to the court of civil appeals. We will proceed to dis-

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pose of the grounds upon which this right is asserted.

The first contention is that the act purporting to amend that establishing the court of chancery appeals, now the court of civil appeals, and extending its jurisdiction, is unconstitutional and void, because it violates article 2, section 17, of the constitution of the State, providing that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

While counsel for plaintiff and defendant agree in this contention, we must determine it upon its merits, since statutes which are constitutional and valid cannot be disregarded, nor jurisdiction conferred by consent.

The precise objection to the act is that the subject is not expressed in the title. It is twofold, and may be stated as follows:

(1) That the title to the original act (chapter 76 of the Acts of 1895) is restrictive, and confines the subject there expressed to the establishment of a court for the review of causes appealed from the chancery courts of the State; and, therefore, the provisions of the amendatory act, extending the jurisdiction of that court to the review of cases brought from circuit and common-law courts, are not germane, but foreign, to it.

(2) That the subject expressed in the title of chapter 82, Acts 1907, is the amendment of chapter 76 of the Acts of 1895, creating the court of chancery appeals, while the body of it is a new and complete scheme of

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legislation, establishing a new and distinctly different court, with entirely different jurisdiction and powers; that instead of amending the former act, by implication it repeals it.

If either of these contentions is sound, the act is void, and must be so held. The particular part of the provision of the constitution here invoked, that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title, is mandatory, and all legislation, to be valid, must comply with it. This was held by this court in the first case in which this provision came before it for construction, and has been adhered to in all subsequent cases. *Cannon v. Mathes*, 8 Heisk., 519. The object of the provision requiring the subject to be expressed in the title is that members of the general assembly and the public may have notice of the nature of the proposed legislation and surprise and fraud in the enactment of laws prevented; and that of the further provision, that the bill shall embrace but one subject, to prevent improper and unlawful combinations between the members of the general assembly, resulting in the passing of statutes which have no natural connection and would in separate bills fail of enactment. It is liberally construed, in order that the general assembly may not be unnecessarily embarrassed in the exercise of its legislative powers and functions, and whatever is sufficient to effect its object will be held to be a compliance with this mandate of the organic law, and the legislation in

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this respect valid. *Cannon v. Mathes*, supra; *Morrell v. Fickle*, 3 Lea, 81; *Truss v. State*, 13 Lea, 312; *Luehrman v. Taxing District*, 2 Lea, 428; *Frazier v. Railway Co.*, 88 Tenn., 158, 12 S. W., 537.

Titles to statutes may be general or restrictive, or, in other words, broad or narrow, since the legislature in every case has the right to determine for itself how comprehensive shall be the object of a statute, and it also has a wide discretion in the particularity of the title selected to express it, provided that, by a fair construction, such title complies with the constitutional provision in question.

A general title is one which is broad and comprehensive, and covers all legislation germane to the general subject stated. It is not an objection that it covers more than the subject of the body of the act, but it must not cover less. It is not necessary that it index the details of the act, nor give a synopsis of the means by which the object of the statute is to be accomplished. All matters which are germane to the subject may be embraced in one act. The scope of a general title is defined in one case in these words:

"The true rule of construction, as fully established by the authorities, is that any provision of the act directly or indirectly relating to the subject expressed in the title, and having a natural connection therewith, and not foreign thereto, should be held to be embraced in it." *Cannon v. Mathes*, supra.

And in another it is said: "Where the title of a

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legislative act expressed a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated, are properly included in the act and are germane to its title." *State v. Yardley*, 95 Tenn., 555, 32 S. W., 481, 34 L. R. A., 656.

A restrictive title is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation. When this is done, notwithstanding a general title could have been adopted, which would have covered the entire subject, and authorized legislation upon the whole of it, the body of the act must be confined to the particular portion of it expressed in the limited title.

The case of *Hyman v. State*, 87 Tenn., 112, 9 S. W., 372, 1 L. R. A., 497, is the leading case in the State upon this question. There this is quoted with approval from Cooley on Constitutional Limitations:

"The legislature may make the title to an act as restrictive as they please. It is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the bill has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the con-

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stitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been more comprehensive, if in fact the legislature have not seen fit to make it so."

And in *State v. Bradt*, 103 Tenn., 591, 53 S. W., 944, it is said:

"It is well settled that an act may be limited to a particular part or branch of a general subject by a restrictive title, and that legislation under such a title, to be good, must be confined within the limitations prescribed."

The law in relation to general and restrictive titles is well expressed by Mr. Justice Caldwell in *State, ex rel., v. Schlitz Brewing Co.*, 104 Tenn., 715, 728, 729, 59 S. W., 1033, 78 Am. St. Rep., 941. He says:

"The title of a legislative bill may be either narrow and restricted, or broad and general, as the members of the general assembly may prefer, and, whether it be in the one form or the other in a given instance, all legislation that is germane to the subject as expressed in the title is within the title and permissible under it; but, of course, much that might be germane under the latter class of titles could not be so under the former.

"If the title adopted be narrow and restricted, carving out for treatment only a part of a general subject, the legislation under it must be confined within the same limits (*State v. Bradt*, 103 Tenn., 584, 53 S. W.,

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942; *Hyman v. State*, 87 Tenn., 109, 113, 9 S. W., 372, 1 L. R. A., 497; Cooley, Const. Lim. [5th ed.], 179); and if it be broad and general, the legislation under it may have a like scope.

"In every instance the enactment must come within the title, but in no case is it required to cover the whole domain within the title. The constitution forbids that an enactment shall go beyond the limits of its title, but there is no requirement that it shall completely fill it. Our statute books afford numerous instances of somewhat meager enactments under ample titles, and there are perhaps but few of those with broad and general titles that would not admit of some additional provision."

These rules apply to amendatory statutes. Such a statute incorporates itself with the original law, and the two become one act, as fully and completely as if enacted at one time in one bill, and the matter of the amendment must not only be germane to the body of the original act, in order to avoid violating the one-subject mandate of the constitution, but, in the absence of an enlargement of the title of the latter act, it must come within the title of the original statute and be germane to the subject there expressed, in order to comply with the other mandate that the subject be expressed in the title. If it be otherwise in either particular, it is void. *Hyman v. State*, supra; *Goodbar v. Memphis*, 113 Tenn., 23, 81 S. W., 1061.

The familiar canon of construction, that where the

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constitutionality of a statute is called in question, every intendment and presumption is in its favor, and every doubt must be solved so as to sustain it, and where it is subject to two constructions, that which will sustain its constitutionality must be adopted, is applicable in the interpretation of titles. *Cole Manufacturing Co. v. Falls*, 90 Tenn., 466, 16 S. W., 1045; *State, ex rel., v. Schlitz Brewing Co.*, 104 Tenn., 718, 59 S. W., 1033, 78 Am. St. Rep., 941.

We will now apply these general principles and rules to the legislation here assailed, and determine whether or not it is subject to the objections urged against it. This will require a somewhat lengthy statement of the titles and bodies of the act creating the court of chancery appeals and the one purporting to be an amendment of it.

The title of chapter 76 of the Acts of 1895 is in these words:

"An act to establish a court of chancery appeals; to define its jurisdiction and powers; to regulate the appointment and election and fix the salaries of the judges thereof; to prescribe the duties and fix the compensation of the clerks and marshals thereof; and to limit the jurisdiction of the supreme court in regard thereto."

The first section enacts that "a court of chancery appeals be and the same is hereby established, to be composed of three judges learned in the law." The remainder of this and sections 2, 3, 4, 5, 6, 7, 8, 9, 10,

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and 13 relate to the qualifications, salary, appointment, and election of judges of the court, the filling of vacancies in this office, the rules of practice in the court, and provide for clerks and marshals and their compensation, and fix the regular sessions of the court, and authorize special sessions.

Section 11 relates to the jurisdiction of the court, and is as follows:

"Sec. 11. Be it further enacted, that the jurisdiction of said court of chancery appeals shall be appellate only, and shall extend to all such equity causes (except those involving State revenue) now and hereafter pending in the supreme court as may be assigned to its dockets, and provided in section 14 of this act; the findings of fact of said court of chancery appeals shall, in all cases, be reduced to writing, and be conclusive, and the jurisdiction of the supreme court shall not extend thereto; but from the decision of said court of chancery appeals, upon questions of law, appeals in the nature of writs of error, or writs of error, may be taken to the supreme court without additional security within thirty days, the former by the entry of a prayer therefor on the minutes of said court, and the latter by having the transcript filed in the supreme court and giving notice to the opposite party or his solicitor of record, and such appeals in the nature of writs of error or writs of error shall be tried in the supreme court upon the same transcripts, together with said written findings of fact. Said court of chancery appeals shall render judgment or de-

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cree in all causes assigned to it, upon which, unless removed to the supreme court as herein prescribed, final process may issue returnable as in case of like process issued upon the judgments or decrees of the supreme court."

Section 12 makes it a court of record, and provides that its judgments and decrees shall be a lien upon the debtor's land from the time the same shall be rendered to the same extent as are the judgments and decrees of other courts of record in this State.

The title of the amendatory statute, chapter 82 of of the Acts of 1907, is as follows:

"An act to amend chapter 76 of the Acts of the general assembly of Tennessee, entitled 'An act to establish a court of chancery appeals; to define its jurisdiction and powers; to regulate the appointment and election and fix the salaries of the judges thereof; to prescribe the duties and fix the compensation of the clerks and marshals thereof; and to limit the jurisdiction of the supreme court in regard thereto,' passed April 24, 1895, and approved April 29, 1895, so as to increase the number of judges of said court of chancery appeals, to change its name, to increase its jurisdiction, and to further limit the jurisdiction of the supreme court, and to repeal all laws or parts of laws in conflict with this act."

By sections 1, 2, 3, and 4, the number of judges of the court of chancery appeals is increased to five and

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provision made for the appointment and election of the two additional judges.

Section 5 prescribes when and where the sessions of the court shall be held.

Section 6 changes the name of the court to that of the court of civil appeals.

Section 7 confers further jurisdiction upon the court, and is in these words:

"Sec. 7. Be it further enacted, that the jurisdiction of said court of civil appeals shall be appellate only, and shall extend to all cases brought up from courts of equity or chancery courts, except cases in which the amount involved, exclusive of costs, exceeds one thousand dollars, and except cases involving the constitutionality of the statutes of Tennessee, contested elections for office, State revenue, and ejectment suits, and to all civil cases tried in the circuit and common-law courts of the State, in which appeals in the nature of writs of error, or writs of error, may be applied for, for the purpose of having the action of the said trial courts reviewed. In all cases in which appellate jurisdiction is herein conferred upon said court of civil appeals, the appeals and appeals in the nature of writs of error from the lower court shall be taken directly to said court of civil appeals; and said court or any judge thereof is hereby given the same power to award and issue writs of error, *certiorari* and *supersedeas*, which the supreme court has heretofore had in such cases, returnable to said court of civil appeals. The

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practice in such cases in said court shall be the same as is now prescribed by law for the supreme court. In all cases in which appellate jurisdiction is not conferred by the terms of this act upon said court of civil appeals, appeals therefrom shall be direct to the supreme court, and in such cases writs of error, *certiorari* and *supersedeas* shall be issued by and made returnable to the supreme court, as is now provided by law; and in such cases the supreme court shall have exclusive jurisdiction, and shall try and finally determine the same, and shall not, after this act takes effect, assign the same for trial by said court of civil appeals."

Section 8 provides for the review of the judgments and decrees of the court by the supreme court by *certiorari*; that being the only mode in which it can be done.

Section 9 relates to cases in which appeals were perfected from chancery courts before the act became effective.

Section 10 enacts that "except as amended by this act chapter 76 of the Acts of 1895 shall remain in full force."

We do not understand it to be insisted that these statutes relate to distinct and separate subjects, and that when the latter is considered as incorporated in the body of the first two subjects are embraced. Such a contention could not be sustained. We think it clear that the subject of the enacting parts of both acts is the establishment of a court of intermediate appellate ju-

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risdiction, to relieve the congested dockets of this court, and thus make effective the constitutional mandate that courts shall be open and justice administered without delay. This is their single and common purpose. It was the sole reason for their enactment. That it was the object of the first distinctly appears from its preamble, which, while not a part of the statute and not controlling, may be looked to and considered in ascertaining the intention of the general assembly, along with other statutes enacted in relation to the same subject-matter, as well as the then condition of public affairs and contemporary history.

And it was so held by this court in the case of *McElwee v. McElwee*, 97 Tenn., 658, 37 S. W., 562, in sustaining the constitutionality of that act. It is there said:

"As this is the first occasion upon which the constitutionality of this act has been called in question, we deem it proper to enter somewhat into the history of its passage and the creation of the court of chancery appeals, and the reason and occasion for its establishment. Since the constitution of 1870, and, indeed, before that time, the dockets of the supreme court had been overburdened with appeals, until it became impossible to properly dispose of them. Various expedients were resorted to to give the relief desired, and to afford to litigants the prompt hearing which they were entitled to under the constitution and bill of rights. Intermediate courts have from time to time been created

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and vested with power more or less extensive—such as the commission court, the court of referees, the arbitration court—and, under the constitution of 1870, the number of judges of this court was temporarily increased to six, so as to enable it to sit in two sections. These were, however, at best, but temporary expedients, and, while the courts thus created did much labor and accomplished a great deal towards effecting speedy trials of causes appealed, still, being only temporary and limited as to time, and to some extent as to power, they could not accomplish all that was desired, even though they may have exceeded popular expectations. But all these courts have passed away, and live only in the history of the State's jurisprudence. The volume of litigation has not, however, decreased. There are nearly fifty inferior courts of circuit, criminal, chancery, and special jurisdiction, from which appeals lie to this court, besides the different county courts in the various counties of the State, from which, in many cases, appeals lie direct to this court. The consequence is that the task of disposing of the causes upon the dockets of the supreme court was more than could be accomplished by that court, although more than 1,200 cases per annum were disposed of. There is a limit to human capacity for work and to human endurance of toil. When that limit was reached, the question simply resolved itself into whether causes would be allowed to accumulate and incumber the dockets, or some other means be devised to hear and

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dispose of them. The act has been referred to as a measure for the relief of the supreme court. This is a misnomer and a misconception. The act does not relieve the supreme court or its judges from labor; it was not so intended, but to relieve litigants from the delay which had become unavoidable from overcrowded dockets."

The court established by the act of 1895 contributed to this general purpose. It only had jurisdiction of cases appealed to this court from the chancery courts of the State, it is true; but the relief it afforded in the final disposition of these cases enlarged the time of the court for the trial and consideration of cases brought up from the circuit, common-law, and criminal courts of the State. This limited relief was, after the lapse of several years, deemed insufficient, it is to be presumed, by the general assembly; for such is the well-known fact, and the last act was passed providing for the review of other classes of litigation. The general purpose of both acts was to facilitate the final disposition of all classes of litigation in this court, and the provisions of both are the means by which this general purpose was undertaken to be effected. The purposes and objects of the two acts are germane. They are the same, and constitute but one subject. They could have been embraced in one act under a proper title, and therefore the latter is proper matter of amendment of the first. When a statute has but one general object or purpose, the subject is single, however multitudinous

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may be the means or instrumentalities provided for effecting that purpose. *State v. Brown*, 103 Tenn., 449, 53 S. W., 727; *Morrell v. Fickle*, 3 Lea, 79; *State v. Hamby*, 114 Tenn., 364, 84 S. W., 622; *Cannon v. Mathes*, 8 Heisk., 504; *Frazier v. Railroad Co.*, 88 Tenn., 157, 12 S. W., 537.

The object and purpose of the act, as a general thing, is the subject of it, in the sense of this mandate of the constitution. We have, then, only to determine whether or not the subject expressed in the title of the act of 1895 is broad and comprehensive enough to cover the common object and purpose of it and the present act. We think it is. It is entitled "An act to establish a court of chancery appeals; to define its jurisdiction and powers; to regulate the appointment and election and fix the salaries of the judges thereof; to prescribe the duties and fix the compensation of the clerks and marshals thereof; and to limit the jurisdiction of the supreme court in regard thereto." The subject here expressed is the creation of an intermediate appellate court. This is clearly indicated by the language used. It is sufficient to give notice to the members of the legislature and the public that such a court is intended to be established, which is all that the constitution requires to be done. That the court was styled a court of chancery appeals could not be understood as limiting the object of the court or the jurisdiction to be conferred upon it, because by the succeeding section of the title notice is given that the act will contain a

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provision defining the jurisdiction of the court to be established. The dominant purpose which the title expresses is the intention to create a court of intermediate appellate jurisdiction, and not the nature and extent of the jurisdiction to be conferred upon that court; that being a detail to be stated and defined in the body of the act. There is a broad distinction between the purpose to create a court and the jurisdiction to be conferred upon that court, and the two must not be confused. This is strongly stated by Mr. Justice Freeman in the case of *Jackson v. Nimmo*, 3 Lea, 597, which involved the constitutionality of the act passed, in 1877, conferring on chancery courts of the State jurisdiction of certain actions which theretofore was vested exclusively in the circuit and other courts of common-law jurisdiction. Speaking for the court he said:

“The distinction attempted to be pointed out is between the existence of the court as a concrete fact and the jurisprudence which that court administers by the agencies of its organism. . . . The court must necessarily be existent before it can exercise jurisdiction at all; so that it is a separate and independent thing, both in thought, logic, and fact, from the matter of its jurisdiction. This may be more or less extensive, may fluctuate, be enlarged or diminished, and yet the court remains, as we have said, the same organic thing, ready to do the work that may be assigned to it, whether much or little.”

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This construction of the title of the original act is well supported by the previous adjudications of this court. We will refer to only a few of them. The title of the act involved in the case of *Cannon v. Mathes*, supra, was in these words: "An act to fix the State tax on property." Acts 1870, p. 120, c. 74. The first section of the act levied a State tax of forty cents on every \$100 worth of property; the second section repealed a former act upon the same subject; the third section prescribed the manner and order in which the comptroller and the treasurer were authorized to dispose of public money; and section 4 increased the tax on privileges fifty per cent. The objection to the bill was that the title did not express its subject and that the body contained two subjects. The court, speaking through Chief Justice Nicholson, after stating the rules of construction to be applied in such cases, held that the general subject of the act was State revenue, that all of its provisions related to this subject, and that it was sufficiently expressed in the title. The act was sustained.

The case of *Morrell v. Fickle*, supra, is very much in point. The general assembly of 1879 passed an act entitled "An act to establish a chancery and law court at Bristol, in the county of Sullivan." Acts 1879, p. 161, c. 127. The first nine sections of the enacting part of the act provided for the establishment of a chancery court to be held at Bristol by the chancellor of the division in which Sullivan county was then embraced,

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and the other sections for a law court to be held there by the judge of that judicial circuit. The act was assailed upon the ground that the title did not express the subject and that the body embraced two subjects. Mr. Justice McFarland, speaking for the court, said:

"The argument is that this act embraces two subjects—one, the establishment of a chancery court; the other, the establishment of a law court.

"The solution of this question depends in a great measure upon whether we adopt a liberal or a strict construction of the clause in question. A construction might be adopted of such a latitudinous character as virtually to neutralize the beneficial effects intended to be secured. On the other hand, a too rigid and strict construction would, in many instances, unnecessarily embarrass useful legislation.

"The duty of the court to pass upon the constitutionality of legislative acts is a very grave and responsible one. Every presumption should be made in favor of the validity of laws. The members of the legislature in enacting laws must, of necessity, judge of their constitutionality in the first instance, and the opinion of that body, which is not conclusive upon the court, is yet entitled to respectful consideration, due from one department of the government to another; and while the constitution is the supreme law, and the court should not, out of any mere feeling of deference to the legislature, hesitate to maintain its supremacy, yet legislative acts should not be subjected to a hypercritical

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test. If subject to two reasonable constructions, they should be construed so as to give them effect, rather than to defeat them.

"They should not be declared void unless they appear to be manifestly so according to the plain letter and spirit of the constitution. Such are, in substance, the general principles maintained by Judge Cooley in his standard work (Cooley, Const. Lim., p. 182) and also by this court in *Cannon v. Mathes*, 8 Heisk., 504.

"Coming more directly to the provisions in question, Judge Cooley says, and his language is quoted with approbation in the case above referred to, that 'there has been a general disposition to construe these provisions liberally, rather than embarrass the legislation by a construction whose strictness is unnecessary to the accomplishment of beneficial purposes for which it is adopted.'

"Again: 'The general purpose of these provisions is accomplished when a law has but one general subject, which is fairly indicated in its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act would not only be unreasonable, but would actually render legislation impossible.' Const. Lim., 144; *Cannon v. Mathes*, 8 Heisk., 519. . . .

"A correct view of this question may be obtained by bearing in mind the evils intended to be guarded against. 'The intent of these provisions was to prevent the union in the same act of incongruous matters and

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of objects having no connection or relation, and, with these, to prevent surprise in legislation, by having matter of one nature embraced in a bill where the title expressed another.' To prevent log-rolling or omnibus bills, and the evils and corruptions sometimes supposed to prevail in such cases, to prevent smuggling through important measures as amendments to or as parts of other laws, with which they have no connection, such, for instance, as attaching a charter for a bank to a bill granting aid to a railroad, or a section creating a felony to an act relating to a public road.

"Does this act come fairly within the evil to be remedied? Shall we say that the establishment of a chancery court at Bristol is one general subject, and the establishment of a law court is another general subject, and that it is necessary, in order to maintain the integrity of a clause of the constitution in question, to hold that these two general subjects should be accomplished by separate acts? . . . Treating the general subject of the act as the establishment of such additional courts for Sullivan county as the public exigencies demanded, it is manifest that this one subject is expressed in the title, to wit, 'An act to establish a chancery and law court at Bristol, in Sullivan county.' . . . It is argued that the title indicates but one court, a court having common-law and equity jurisdiction; whereas, the act provides for two courts, one of chancery and the other of law jurisdiction. This may

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be the strictly grammatical construction of the language of the title, but the point, though ingeniously pressed, is too fine for practical application."

The case of *State v. Brown*, supra, involved the constitutionality of an act entitled "An act to amend section 5365 of Milliken & Vertrees' Compilation of Laws of Tennessee, being section 4614 of the Code as amended by chapter 56 of the Acts of 1871, so as to raise the age of consent as set forth in said section to twelve years, and to prescribe the punishment in the penitentiary against persons having carnal knowledge of females over twelve and under sixteen years and one day of age." Acts 1893, p. 273, c. 129.

The body of the act contained provisions as specifically indicated in the title, and also for the punishment of persons aiding or abetting in the commission of those two offenses. It was held that the subject expressed in the title was the prevention and punishment of carnal connection with young females, and that all the provisions of the act related to this subject and were germane. It is there said:

"The subject of the legislation is general, and, being so, it is sufficient to cover all provisions in harmony with the object sought to be accomplished. It was not essential that the title be made an index or epitome of the act, nor that it should set forth the modes, means, or instrumentalities provided in the act for its administration and enforcement."

In *Ryan v. Terminal Company*, 102 Tenn., 127, 50 S

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W., 744, 45 L. R. A., 303, where an act was assailed for insufficiency of title, it is said:

"The title gives clear notice to the legislature and the public that the object of the act is to provide for the organization of railroad terminal companies, which shall be clothed with powers necessary to effectuate the purposes of their creation."

For this reason the act was held to comply with this mandate of the constitution. And in *Truss v. State*, 13 Lea, 312, where this question was involved, it is said:

"Whatever is of sufficient import to direct the mind to the subject of proposed legislation meets the object of the constitution."

The validity of the act of 1907, however, does not depend upon the scope of the title of the act of 1895, which we have been discussing, but upon its own title.

The titles of the two acts are not the same. That of the last not only sets out in full the title of the original act, but materially enlarges it. The subject expressed is that of the original act, and the amendment of that act by increasing the number of judges of the court created by it, changing the name of the court, increasing its jurisdiction, and further limiting the jurisdiction of the supreme court.

Thus the title of the act of 1895 and its body are both amended by the latter act.

While a general title covering an entire subject cannot be enlarged by an amendatory act so as to include

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other matter, because thereby two subjects would be introduced in the body of the act, we can see no reason why a restrictive title cannot be enlarged by that of an amendatory act, so as to allow legislation germane to the body of the original act. The title of the original act could have been made broad enough to cover matter of the amendment, and whatever could have been done originally can be done by amendment. If the rule were otherwise, it would be impossible to amend an act with a restrictive title, however germane the proposed amendment might be to the body of the original act. While this direct question has not before been presented to this court, yet we think the principle is distinctly recognized in our cases.

In the case of *Hyman v. State*, supra, relied upon by counsel in support of their proposition, the amendatory act merely stated the caption of the original act, which was restrictive, and did not enlarge it so as to cover the matter of the amendment, which, admittedly, was germane to the body of the act. For this reason the latter act was held void. It is there said:

"The title to the amendatory act in no way indicates the character of the amendment beyond a correct recital of the title of the act amended. It is not, however, important that the title of the amendatory act should do more than recite the title or substance of the act amended, provided the amendment is germane to the subject of the original act and is embraced within the title of such amendatory act. In other words, if the

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title of the original act is sufficient to embrace the matter covered by the amendment, it is unnecessary that the title to the amendatory act should of itself be sufficient."

And in the case of *State v. Algood*, in 87 Tenn., 163, 10 S. W., 310, it is said:

"The criticism is that the title does not indicate the character of the proposed amendment. This is not necessary, if in fact the amendment is germane to the original act and is embraced within the title of the original or amended act. In such case, the title of the original act being made a part of the title of the amendatory act, the particulars of the amendment need not be shown by the title."

These cases are cited with approval in the later ones of *Goodbar v. Memphis*, 113 Tenn., 35, 81 S. W., 1061, and *Galloway v. Memphis*, 116 Tenn., 747, 94 S. W., 75.

We think it clearly inferable, from the quotation, we have made from *Hyman v. State*, that if the title to the amendatory act attacked in that case had, in addition to reiterating the title of the original act, gone further and stated the subject of the amendment, this court would have sustained the act. The object of requiring the subject of an act to be expressed in the title is to give notice to the members of the general assembly and the public of the character of the legislation about to be enacted. The evil intended to be prevented is surreptitious legislation. Clearly, if the title of the

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amendatory act gives notice that a particular act is to be amended and the nature of the amendment proposed to be made, this is done so far as compliance with the mandate of the constitution can effect it. The general assembly is empowered by the constitution to amend all laws; the only limitation upon it being that the title or substance of the law amended shall be recited in the caption or otherwise in the amendatory act. The power to amend acts with restrictive titles is not withheld, but it could not be exercised unless the restrictive title can be enlarged so as to state the subject of the amendment. If the law were otherwise, it would result in much embarrassment to wholesome and needed legislation.

That the subject of the amendment is properly expressed in the title of the amendatory act we think there can be no doubt.

Certainly, the statement that the act was for the purpose of amending the one creating the court of chancery appeals, so as to increase the number of judges of the court, to change its name and increase its jurisdiction, and further limit that of the supreme court, conveyed to the mind of every one information that additional jurisdiction, other than that of chancery appeals already vested in that court, was intended to be conferred upon it. These changes proposed were of the most radical character, and well calculated to give notice that enlarged jurisdiction was intended to be conferred upon the court. The jurisdiction, as it had ex-

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isted, was confined to the trial of chancery appeals, except those involving the revenue of the State, small in number, and there was no other civil jurisdiction to be conferred, but that of cases brought by proper proceedings in error from the circuit and common-law courts of the State. The notice that the judicial force would be increased clearly indicated a large increase of work to be performed, and the jurisdiction already possessed of necessity gave notice that the increase must relate to other classes of litigation. The name of the court implied that this increased jurisdiction would be cases of a civil nature.

We also think that the provisions of the act of 1907 are amendatory as purported in the title. While the act changes the name of the court of chancery appeals, increases its judicial force, confers upon it other and further jurisdiction and powers of the most important character, and provides for the exercise of them in a manner which that court could not under the act creating it, it is not an independent and complete scheme of legislation and does not establish a new court. This is made clear by a comparison of the provisions of the original act, which is a complete scheme of legislation, with those of the one in question.

The act of 1895 creates and establishes a court of intermediate appellate jurisdiction, styled the "court of chancery appeals," provides for the number of judges to preside in it, their eligibility, qualifications, compensation, mode of appointment and election, the

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filling of vacancies, permanent or temporary; fixes the regular sessions of the court and authorizes special sessions to be held; provides for clerks and marshals to keep its records and attend it, and their compensation; makes it a court of record, defines its jurisdiction and powers and the mode of invoking them, and the effect of its judgments and decrees as liens upon the lands of parties against whom decrees may be pronounced; authorizes it to adopt its own rules of practice, and prescribes the proceedings to be pursued to review its decrees. Here a court is created, invested with well-defined jurisdiction and powers, and equipped with all the officers and machinery necessary and convenient for the exercise of them. Not only a court is created, but every constituent element necessary for its organization, the exercise of its jurisdiction, and the enforcement of its decrees is provided for. This is a complete and independent scheme of legislation, however limited the jurisdiction and powers of the court established may be.

Contrast this with the enacting clauses of the act of 1907. They do not purport to establish a court, and do not in fact do so, but in terms increase the judicial force of a court previously established and organized, the court of chancery appeals, from three to five judges, recognizing and conceding the official existence and continuance in office of the three composing that court; change the times when the sessions of the court are to be held, and the name and style of the court, and greatly

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enlarge and extend its jurisdiction and power, and provide new and different means of invoking them. This is the sum and substance of this act. It is obvious that these provisions do not constitute a complete scheme of legislation. They do not create a court of judicature, complete in all its essential constituents—a court which can be organized, try and determine cases, and enforce and execute its judgments. Without the provisions of the act of 1895 we would have judges and jurisdiction without a court, without clerks and marshals, without records, and with no means of enforcing their adjudications.

If it be conceded that this act establishes a court, still it would be abortive, for the reasons stated and the further reason that, while five judges would be necessary to exercise the jurisdiction conferred upon it, it would, under the provisions of the act, have only two judges for the first three years of its existence, and for want of a quorum could do nothing. It is true that by section 2 the three judges of the court of chancery appeals are continued in office as judges of the court of civil appeals, during the constitutional term for which they were elected; but the provision to this effect would be invalid, because the legislature has no power to appoint or elect judges. This provision is a strong evidence of the amendatory character of the act; for it will not be presumed that the legislature intended to pass a void act, as this provision otherwise would be. If

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possible, the provisions of an act must be so construed as to make them sensible and valid.

While for these reasons it is unmistakable that the act of 1907 is not a complete and independent scheme of legislation, creating a new intermediate appellate court to take the place of that established by the act of 1895, and thus by implication repealing that act, there are many things appearing upon the face of it that compel the conclusion that it is, as it purports to be in its caption, an act amendatory of the former one. In the first section it enacts, not that the court of chancery appeals be abolished, but that it be hereafter composed of five judges. In the second section it is enacted "that said court shall consist of three members now composing the same, and the governor shall, immediately after this act takes effect, appoint and commission as judges of said court two additional judges, who shall hold their office" until the first day of September, 1908, and until the qualification of their successors, and whose compensation shall be the same as provided for the present judges. Provision is made for the election of the successors of the two new judges to be appointed by the governor at the next general election, but none made for that of the successors of the three judges of the court of chancery appeals until the expiration of their constitutional term of office, at which time "five judges of said court, instead of three as now provided, who shall have the same qualifications as now required for judges of said court, and said election shall be held

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in the same way and manner as elections for members of the said court are now held"—thus in terms recognizing the provisions of the former act providing for the qualification of judges and the mode of their election. In no other manner are these matters provided for in the latter act. In section 7 it is provided that, after the approval of this act, the supreme court shall not assign cases to the court of intermediate appellate jurisdiction, the subject of the legislation, for trial, as it was authorized to do by the act of 1895. If the act of 1895 was intended to be repealed, what was the necessity of this provision?

And by section 10 it is expressly enacted "that except as amended by this act said chapter 76 of the Acts of 1895 shall remain in full force."

There is no ground here for the contention that the act of 1895 is repealed by implication. Repeals by implication are not favored, and a later act will not be held to thus repeal a former one upon the same subject, unless the two are absolutely repugnant and in irreconcilable conflict. Nothing short of this can have that effect. *McCampbell v. State*, 116 Tenn., 107, 93 S. W., 100; *Fisher v. Baldridge*, 91 Tenn., 418, 19 S. W., 227; *Frazier v. Railway Co.*, 88 Tenn., 163, 12 S. W., 537; *Blaufeld v. State*, 103 Tenn., 593, 53 S. W., 1090.

There is no conflict between the act of 1895 as amended by that of 1907; but, on the contrary, the provisions of the two acts are necessary to carry into effect the common object of the general assembly in enacting them.

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The two together, instead of being repugnant, constitute a harmonious whole and one complete scheme of legislation, establishing a court of intermediate appellate jurisdiction, to expedite the review of the judgments and decrees of trial courts and relieve litigants from delays in such matters caused by the congested condition of the dockets of this court.

Therefore it is apparent that the case of *Malone and others v. Williams and others*, 118 Tenn., 390, 103 S. W., 798, lately decided by this court at Jackson, and relied upon by counsel to support the latter subdivision of their objection to the constitutionality of the act, is not in point. There the later act, while purporting in its title to amend a former one, constituting the charter of the city of Memphis, contained provisions covering the whole subject of the creation and incorporation of a municipality, and was in form and substance a new charter, intended to supersede and take the place of the old one, which the title purported to amend. It vacated and abolished all the offices existing under the old charter, and created new ones, with provisions for the appointment and election of new officers. It was, in short, a new charter, intended to and effective, if it had been valid, to supersede the existing charter of the city. Without going into further details, the character of the legislation in that case held void will fully appear when it is stated, as was conceded, that the bill was originally introduced as an independent act to provide a new charter for the city of Memphis, and its title subsequently

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changed so as to purport to be amendatory of the one then in force. The act under consideration in this case and the one involved in that case are entirely different in form, substance, and effect, and the intention of the legislature in enacting the one directly opposite of that in enacting the other. The act under consideration purports in its caption to, and in its body does, amend the former act in certain particulars, but expressly provides that all the other provisions of that act shall remain in full force and effect. It does not abolish the court or vacate any office. The two are not in conflict, but can stand together and be enforced as a consistent whole. The act declared void in *Malone and others v. Williams and others* in effect abolished the old charter, vacated the offices of all its officers, and created a complete and new city government. It covered the whole ground legislated upon in the former act, constituting the charter of the city of Memphis. The two acts were inconsistent and irreconcilable, and could not stand together, and therefore it was properly held that the subject of legislation in the body of the latter act was not expressed in its title, and that the act was in contravention of section 17, art. 2, of the constitution, and invalid.

We therefore are of the opinion and hold that the subject of chapter 82 of the Acts of 1907 is expressed in its title, and the act is amendatory in its nature, and valid and constitutional.

The second contention of the parties is that upon a proper construction of section 7 of the amendatory act,

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conferring jurisdiction upon the court of civil appeals, cases involving the constitutionality of a statute of Tennessee and certain other classes of litigation are excepted, and the jurisdiction of this court to hear and determine them upon proper proceedings in error as heretofore exercised is not only left undisturbed, but expressly reserved, and that, since this case involves a question of that kind, they are entitled to have it here tried and finally determined. The particular part of this section which it is said must be so construed is in these words:

“That the jurisdiction of the said court of civil appeals shall be appellate only and shall extend to all cases brought up from courts of equity and chancery courts except cases in which the amount involved, exclusive of costs, exceeds one thousand dollars, and except cases involving the constitutionality of statutes of Tennessee, contested elections for office, State revenue and ejectment suits, and to all civil cases tried in the circuit and common-law courts of the State in which appeals in the nature of writs of error, or writs of error, may be applied for, for the purpose of having the action of said trial court reviewed.”

It is insisted that it was the intention of the legislature that the exceptions following the provisions conferring jurisdiction in cases brought up from courts of equity were also intended to apply to cases where proceedings in error were prosecuted to review judgments of the circuit and other courts of common-law jurisdic-

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tion of the State, and that this intent appears upon the face of the statute, when considered and interpreted in the light of the constitutional jurisdiction of this court, its history, and the previous statutes in relation to that jurisdiction, and the objects and purposes of the legislature in enacting this one, and that it should be so construed.

This contention involves the jurisdiction of this court and the right of litigants to invoke it directly by appeal, appeal in the nature of a writ of error, and writ of error, the forms of proceeding in error which have been so long allowed by express statutes and freely exercised by all parties seeking to review the judgments of trial courts of the State, and an understanding of these matters will aid in the decision of the question we now have to decide.

The judicial department of the State was first created and made one of the co-ordinate branches of the State government by the constitution of 1834. The supreme court was established by that constitution and vested with its jurisdiction. The provisions in relation to these matters were brought forward and embraced, in almost the same words, in the constitution adopted in 1870. The judiciary represents its particular part of the sovereignty of the State which the people, the original fountain of all governmental power, have vested in it, and its power is as absolute and uncontrollable within its sphere as that of the legislative and executive departments. They all have the same high origin and

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are equally independent. The supreme court, established and vested with its jurisdiction and powers by the constitution, is the highest judicial tribunal in the State. It takes its rank from the constitution, and it and its jurisdiction cannot be interfered with by the other branches of the government. Its adjudications are final and conclusive upon all questions determined by it, save those reserved to the federal courts, which may be reviewed by the supreme court of the United States. *Miller v. Conlee*, 5 Sneed, 432; *Dodds v. Duncan*, 12 Lea, 731; *State v. Gannaway*, 16 Lea, 124.

Its jurisdiction is appellate only; the concluding part of the last sentence of article 6, section 2, referring alone to the powers which it may exercise to enforce that jurisdiction. *State v. Bank of Tennessec*, 5 Sneed, 573; *Memphis v. Halsey*, 12 Heisk, 213; *State v. Gannaway*, 16 Lea, 124.

The establishment of the court and vesting it with appellate jurisdiction only is an implied declaration that it shall possess some revisory jurisdiction and powers, and that some right of appeal to it must exist. This inviolable jurisdiction, and the right to invoke it, undoubtedly extends to cases involving questions of law of great public importance; but no definite statement of it can be outlined, and each case must be determined with regard to the questions involved as it arises. The general assembly may, by the establishment of courts of intermediate appellate jurisdiction or other appropriate legislation, limit and restrict the right of litigants to resort

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to it, and regulate the mode of doing so, but not so as to unreasonably interfere with or embarrass its ultimate revisory powers; and it is always for this court to decide when its constitutional jurisdiction is encroached upon. It has exercised this power since it was first established. *Miller v. Conlee*, supra; *State v. Bank*, supra; *Chestnut v. McBride*, 6 Baxt., 95; *Newman v. Scott County Justices*, 1 Heisk., 787; *Ward v. Thomas*, 2 Cold., 565; *Hundhausen v. Marine Fire Insurance Co.*, 5 Heisk., 704; *McElhce v. McElhce*, 97 Tenn., 657, 37 S. W., 560; *Chattanooga v. Keith*, 115 Tenn., 589, 94 S. W., 62.

The right of direct resort to this court by appeal, appeal in nature of a writ of error, and writ of error to review judgments of trial courts was provided for by appropriate legislation when it was first established; and, notwithstanding many attempts have been made to limit and restrict this right, it has never been done, unless it is by the act of 1907 amending that creating the court of chancery appeals. The statutes establishing the court of referees, the arbitration court, and the court of chancery appeals, all courts of intermediate appellate jurisdiction, did not limit this right. Those courts had no direct revisory jurisdiction. All proceedings in error were taken directly to this court in the usual way, and it assigned such cases as it deemed proper to those for decision.

These are matters that must be taken into considera-

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tion in construing and passing upon the validity and effect of all statutes which in any manner affect the jurisdiction of this court and the right to invoke it, under the well-settled rules that all statutes must be construed in connection with all others constituting the system of which they are a part, and that those which limit the jurisdiction of an established court, or confer it upon another court, are to be construed strictly, so as not to interfere with the exercises of that jurisdiction by the former court, unless the legislative intent that that be done affirmatively appears.

Now, coming to the direct question for decision, the controlling principle in the construction of all statutes is to arrive at the intent of the general assembly in enacting them. When that intent is ascertained, it must be given effect, regardless of the wisdom, policy, or convenience of the act, as these are considerations for the legislature, with which the courts have nothing to do. If such intent appears from the plain, unambiguous language of the statute, there is no room for construction, and it must be enforced as written; but when the act is ambiguous, and its meaning uncertain, it is the duty of the court to ascertain and declare the intention of the lawmakers, and to so construe the statute that the true legislative intent may be carried out.

Ambiguity in a statute may arise either from confusion or indefiniteness in the language used, or the consequences of strict adherence to the literalism of that

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language. In Lewis' Sutherland on Statutory Construction, section 377, it is said:

"Uncertainty of sense does not alone spring from uncertainty of expression. It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the legislature. Hence if, viewing a statute from the standpoint of the literal sense of its language, it is unreasonable or absurd, and obscurity of meaning exists, calling for judicial construction, we must in that event look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby, if possible, discover its real purposes; and, if such purposes can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law, the same as if it were plainly expressed by the literal sense of the words used. In that way, while courts do not and cannot properly bend words out of their reasonable meaning to effect a legislative purpose, they do give to words a liberal or strict interpretation within the bounds of reason, sacrificing literal sense and rejecting interpretation not in harmony with the evident intent of the lawmakers, rather than that such intent shall fail."

We think there is such ambiguity upon the face of the provision of this act, conferring jurisdiction upon the court of civil appeals that judicial interpretation and construction are necessary to ascertain and give effect to the intent of the legislature; for, if it be read literally, it will be in part unconstitutional and void, in part in-

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operative, and will lead to the most absurd, unreasonable, and inconsistent results. The general object of the legislature in establishing a court of intermediate appellate jurisdiction, we have seen, was to relieve the congested dockets of this court. It is presumed that that deliberative body, in a matter of this great importance, had a well-defined and consistent scheme or plan to effect this object. The object of the legislation, the relief of the dockets of this court and prevention of delays resulting from its congested condition, could only be effected by conferring upon the court created jurisdiction to review a portion of the cases which were, before the passage of this act, ordinarily brought to this court. The legislature had to determine the jurisdiction to be conferred upon that court, and in doing so it must be presumed that it had in mind the constitutional jurisdiction of this court, which could not be conferred upon any other court or limited and restricted, and that there were also certain classes of litigation which are of such importance to litigants that they have in the past always been prosecuted to final determination in this court, and a review of which, in an intermediate court, would only entail additional delay and expense to litigants, and that it also knew and took into consideration the fact that in cases of comparatively small importance litigants would probably be satisfied by a review of the judgments and decrees of trial courts in a court of intermediate jurisdiction, and allow the litigation there to end, when they would not do so in those of greater importance.

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The further fact that, if the cases of which the court of civil appeals was given jurisdiction were to be ultimately brought to this court for review, the creation of that court would utterly fail of its purpose, could not have been overlooked. Considering the constitutional origin and jurisdiction of this court, and its dignity as the highest tribunal of the State, it was also fit and proper, and must have been intended, that the cases directly brought to it should be those of the highest importance, and that the inferior appellate court should have jurisdiction of those of less importance. We think the legislature was controlled by these considerations, and that this fully appears from the provisions in the statute excepting cases of certain classes from the jurisdiction of the court of civil appeals. We will briefly consider the character and nature of the cases coming within these exceptions.

Cases involving the constitutionality of statutes of Tennessee, the revenues of the State, and contested elections are excepted. These are the most important classes of litigation in our courts, and without doubt are of that character which the jurisdiction of this court to review by direct proceedings in error from the trial court cannot be limited or restricted. Cases involving constitutionality of statutes, on account of their great importance, should be heard and determined by the court of last resort as soon as possible, in order that the public may know whether the statute in question is valid or invalid. The imperative necessity of speedy, uniform,

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and final decision of such cases is too evident to require elaboration. Cases involving State revenue are also of like importance. They vitally affect the interests of the State and all of its citizens. There is the utmost necessity that they be decided by this court speedily and finally. It has always been the policy of the legislature and of the courts to have this done, and in furtherance of this policy it is made the duty of the courts to advance and hear them with preference over all other causes, and they were excepted from the jurisdiction of the referee court, the arbitration court, and the court of chancery appeals. There has never been any statute in this State limiting the right of either the State or the taxpayer to bring such cases directly before this court for adjudication, and it is not to be presumed that the legislature, without some imperative reason therefor, would change its settled policy in so important a matter.

The constitutionality of a statute and the validity of a tax are purely legal questions, and the decision of them by an intermediate appellate court would not, as a rule, satisfy litigants or end the litigation; nor would it lighten the labors of this court any more than the decision of them by the court of original jurisdiction. They are generally brought before this court, and should be, in order that a certain and uniform rule be established.

Ejectment cases involve rights and questions of law of the utmost importance to the people of the State. Our

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land laws are a complicated artificial system, composed of numerous statutes enacted from time to time, and the stability of titles and value of this class of property imperatively require that the construction of these statutes be uniform and settled. The people of the State are more deeply interested in the property involved in such cases than any other kind; the disputes and controversies in relation to it are more hotly contested, and produce more bitterness and violence than that in relation to any other; and every consideration requires a final and speedy determination of this class of litigation.

Contested elections are also cases of great importance, both to the contestants and the public. When they are once instituted, they are, with rare exception, prosecuted to final determination in this court. It is also the policy of the legislature, in order to end the strife and animosities which attend such contests, to have them speedily and finally decided, and for this purpose a special tribunal has been created to try contests for certain offices.

The exception of cases involving the constitutionality of statutes of Tennessee, the revenues of the State, and contested elections from the jurisdiction of the court of civil appeals was evidently made because the constitutional right of litigants to invoke the jurisdiction of this court to review them could not be limited or restricted, and that of ejectment cases on account of the very great importance of that class of litigation, and the

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almost uniform practice to bring them to this court for final decision. We are of the opinion that it was the evident intent of the legislature that all cases coming within these classes should be excepted from the jurisdiction of the court of civil appeals, regardless of whether they originated and were brought up from the chancery or circuit and other common-law courts of the State, and that section 7 of the statute should be so read and construed. If we were to construe this section otherwise, so far as it purports to confer jurisdiction upon that court of cases involving the constitutionality of statutes, the revenues of the State, and contested elections, it would be void, and as to ejectment cases it would be inconsistent and absurd; results which are always to be avoided in the construction of statutes, if it is possible to do so. No good reason can be given why the exceptions contained in the statute should be applied to cases appealed from the chancery court, and not to those brought up for review from the circuit and common-law courts; for none exists. It is true that it is not necessary that a reason appear for the enactment of a statute; but the absence of one for a provision inconsistent with other provisions of a statute and the purpose of the legislation is evidence that the inconsistency is apparent only, and was not intended. We do not think the legislature intended to make a distinction between cases brought up for review because of the court of original jurisdiction. The importance of controversies is not measured in this

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manner, but by the questions of law or fact or the rights of the parties involved. The chancery and circuit courts of the State have very large concurrent jurisdiction, embracing all the cases excepted from the jurisdiction of the court of civil appeals save contested elections; and the same reason that would lead the legislature to except cases originally instituted in one court would apply to those brought in the other. We do not think the legislature could have intended such an inconsistency and absurdity as a distinction of this character in the right of litigants to invoke the jurisdiction of this court, nor do we think it intended to discriminate between litigants bringing suits in the chancery and circuit courts of the State unfavorably to those suing in the latter, which is supposed to be nearer to and more favored by the people of the State on account of its jurisdiction and practice being in conformity with the common law. It is a familiar rule of construction that statutes are to be construed, if possible, so as to give force and effect to all their provisions, and that no part thereof shall be inoperative. If section 7 be not construed to extend the exceptions there made to cases brought up from courts of common-law jurisdiction, one of the exceptions, that of contested elections, wholly fails. The chancery courts of the State have no jurisdiction of contested elections in any case; nor did the court of chancery appeals, as originally established, have jurisdiction of such cases. *Shields v. Davis*, 103 Tenn., 538, 53 S. W., 948. The jurisdiction of such cases is vested in special tribunals

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and in the circuit courts of the State, and they alone have power to hear and determine them. *Harmon v. Tyler*, 112 Tenn., 8, 83 S. W., 1041; *Johnson v. Brice*, 112 Tenn., 59, 83 S. W., 791.

If these exceptions be confined to cases brought from the chancery court, this, one of the most important, will be meaningless and inoperative. Certainly the legislature did not intend this result. The construction we have given this section sustains its validity, gives effect to all its provisions, and carries out the sole and only object of the creation of the court. It is to our minds clearly and indisputably in accord with the legislative intent and necessary to make it effective. It is in accord with the spirit of the act—the only sensible construction that can be given it. It is in accordance with the well-settled rule that, whenever the legislative intent can be ascertained, it will be given effect, if possible, without regard to the letter of the statute, and that the real intention of the legislature will always prevail over the literal use of terms. *State v. Clarksville & R. Turnpike Co.*, 2 Sneed, 89; *Brown v. Hamlett*, 8 Lea, 735. And a reasonable construction, rather than one that is unreasonable, must be given a statute, when it is susceptible of such construction. *Horne v. Railroad*, 1 Cold., 78; *Bank v. Cooper*, 2 Yerg., 603, 24 Am. Dec., 517.

The rule of construction applicable to this case is well stated in Lewis' Sutherland on Statutory Construction, section 376, in these words:

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"When the intent is plain, words, and even parts of sentences, may be transposed to carry it into effect. Restrictive clauses, significant of the intent in certain divisions, may be supplied by intendment in others. General words do not always extend to every case which literally falls within them. When the intention can be collected from the statute itself, words may be modified, altered, supplied, or disregarded, so as to obviate any repugnance or inconsistency with such intention."

This is in substance held in our own cases of *Nichols, Sheppard & Co. v. Loyd*, 111 Tenn., 145, 76 S. W., 911, and *Wright v. Cunningham*, 115 Tenn., 445, 91 S. W., 293, and *State v. Phoenix Insurance Co.*, 92 Tenn., 427, 21 S. W., 893. To the same effect is the case of *United States v. Kirby*, 7 Wall. (U. S.), 482, 19 L. Ed., 278. In the case of *Gold v. Fite*, 2 Baxt., 249, Mr. Justice Cooper, speaking for the court said:

"A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter. And a thing which is within the letter of a statute is not within the statute, unless it be within the intention of the makers, and such construction ought to be put upon it as does not suffer it to be elevated" [included].

In *Rose v. Wortham*, 95 Tenn., 508, 32 S. W., 459, 30 L. R. A., 609, Mr. Justice Wilkes says:

"In *Sutherland on Statutes and Statutory Construction* it is said in substance that the presumption is that the lawmakers have definite purposes in every enactment, . . . and that purpose is an implied limita-

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tion on general terms and a touchstone for the exposition of narrower terms used in the statute. The cardinal purpose of the act must control, and words and phrases must be read in such sense as will harmonize with the subject-matter and general purpose of the statute. Mr. Kent, upon the same subject, says: 'In the exposition of a statute, the intention of the lawmakers will prevail over the literal sense of the terms, and its reasons and intentions will prevail over the strict letter.'"

He further quotes with approval this from Mr. Sutherland's work:

"Not only may the meaning of words be restricted by the subject of the act, . . . but for like reason they may be extended. . . . The intention of the act will prevail over the literal sense of its terms. . . . The particular inquiry is, not what is the abstract force of the words used, but in what sense were they intended to be used as found in the act? This sense is to be collected from the context, and a narrower or more extended meaning according to the intention thus enacted."

We think, in the light of these authorities, the clear intent of the legislature appearing, the statute must be construed so as to apply the exceptions we have specially mentioned to all cases appealed from trial courts of this State. The majority of the court, however, are of the opinion that the reasons upon which we are brought to this conclusion do not apply to the exception of cases involving more than \$1,000, and that, therefore, in all suits brought up from circuit and common-law courts

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of the State, not coming within the other four classes mentioned, the court of civil appeals has primary appellate jurisdiction to review the judgments of those courts.

Mr. Justice Neil and the writer of this opinion do not concur with the majority in the distinction here made between the five exceptions to the jurisdiction of the court of civil appeals contained in the statute. We think all the exceptions were intended to apply to all cases brought up from trial courts for review, and that no such distinction can logically be made.

While cases involving the constitutionality of statutes, questions of State revenue, contested elections, and land titles are of greater public importance, and stronger reasons exist for their review by direct proceedings in error by the court of final resort than those involving mere sums of money, yet the legislature, in limiting the jurisdiction of the court of civil appeals, has classed them all together. The legislature unquestionably had the power to do this. The reason for this classification is immaterial. It must be presumed that it was a sound one. It may have been because cases of this magnitude are generally appealed to this court, and it would serve no good purpose to have them pass through an intermediate appellate court. We can see no good reason why four of the five exceptions made in the statute should be carried forward into and held to limit the law jurisdiction of the court of civil appeals, while a different effect is given to the fifth. All the excep-

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tions appear in the same sentence, and have the same connections with the other parts of the jurisdictional provisions of the statute, and the words supplied or transposed, necessary to extend one of them, apply with equal force to all of them. We find nothing in the statute expressive of the legislative intent that there should be any distinction in the jurisdiction conferred by this section in any case because of the court in which it was originally brought. The construction that we have given the statute makes all of its provisions upon the subject of jurisdiction harmonious and consistent, and maintains uniformity in the jurisdiction of both appellate courts. We believe the same legislative intent exists as to all the exceptions made, and that they must all be treated alike. There is, in our opinion, no recognized rule of statutory construction upon which we can hold otherwise.

For these reasons we dissent from the opinion of the majority upon this point.

The writer of this opinion, while not dissenting from the conclusion of the majority upon which the motion of the parties to have this case here docketed and tried is sustained, is of the opinion that that is not the true and sound ground upon which the decision of the court should be rested. The act of 1907, conferring limited appellate jurisdiction upon the court of civil appeals, is not, in his opinion, effective to deprive this court of any part of the jurisdiction which had been conferred upon it by previous statutes, or to restrict the right

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of litigants to invoke it by the ordinary proceedings in error. In other words, the jurisdiction conferred upon that court is not exclusive, but concurrent. The jurisdiction of an established court is not affected by a statute conferring the same jurisdiction upon another court, unless the purpose that the jurisdiction conferred shall be exclusive in the latter court be expressed in clear and unmistakable terms. This is a well-settled principle applicable to the jurisdiction of courts.

In Lewis' Sutherland on Statutory Construction, section 569, the rule is stated in these words:

"When the jurisdiction is once granted, it will not be deemed taken away by a similar jurisdiction being given to another tribunal. In *Commonwealth v. Hudson*, the question was whether a grant of certain jurisdiction to justices of the peace affected that previously existing in the court of common pleas over the same subject. Shaw, C. J., said: 'Before this statute the court of common pleas had jurisdiction over this matter. Is that jurisdiction taken away? It is no answer to say that another tribunal has jurisdiction, for that is very common. It is, in such a case, concurrent jurisdiction, whether so called in the statute or not. There must be words of limitation to take it away, either by using the word "exclusive," or by repealing the former act giving jurisdiction, by which it may appear that the legislature meant, not only to confer jurisdiction upon justices of the peace, but to take away the other jurisdiction.' Only express words, or what is equiva-

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lent, can take away the jurisdiction of the superior courts. This principle applies, not only to the court's original, but to its appellate, jurisdiction and its customary modes of exercising them. Statutes which deprive a court of jurisdiction are strictly construed, while those which extend its jurisdiction are liberally construed."

In *Delafield v. State of Illinois*, 2 Hill (N. Y.), 164, this is said:

"There is nothing in the nature of jurisdiction as applied to courts which renders it exclusive. It is not like a grant of property, which cannot have several owners at the same time. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. Jurisdiction is not a right or privilege belonging to a judge, but an authority or power to do justice in a given case when it is brought before him. There is, I think, no instance in the whole history of law where the same grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the cases which would otherwise have been brought before them; but it cannot affect the power of the old courts to administer justice when it is demanded at their hands."

In *Tackett v. Vogler*, 85 Mo., 480, it is said:

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"Where a court originally possesses jurisdiction over a subject, a subsequent legislative enactment giving another court jurisdiction over the same subject, but containing no express words excluding the jurisdiction of the former court or repealing the statute conferring jurisdiction on that court, does not divest it of jurisdiction."

In *First National Bank v. Treasurer of Lucas County* (C. C.), 25 Fed., 749, we find this:

"So, too, it is a general rule of law that in all these cases of special tribunals their jurisdiction is strictly confined, and never excludes the court of ordinary jurisdiction, except upon the clearest direction of the legislative will."

In *Cook v. State National Bank of Boston*, 52 N. Y., 96, 11 Am. Rep., 672, Church, C. J., in sustaining the jurisdiction of the court to try the case, the objection to it being that it had been conferred on another court, said:

"There are no words of exclusion in the act, and it is a general rule as to all jurisdiction that to confer it upon one court does not operate to oust other courts before possessing it, for the reason that concurrent jurisdiction is not inconsistent."

The consensus of judicial opinion, federal and State, is to the same effect. *Starr v. Trustee*, 6 Wend. (N. Y.), 566; *Commonwealth v. Hudson*, 77 Mass., 64; *Tritt v. Bize*, 51 Ga., 494; *Courtwright v. Bear River, etc.*, Min-

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ing Co., 30 Cal., 580; *McGhee v. State*, 2 Lea, 625; *Taylor v. Pope*, 5 Cold., 414. The question arose in this last case in this way: Previous to May 26, 1866, the jurisdiction of justices of the peace in replevin cases was limited to the property of the value of \$50, and in all other cases jurisdiction was vested in the circuit court. The legislature then passed an act conferring jurisdiction on justices of the peace in cases where the property sought to be replevined was of the value of \$250. It was insisted that the effect of this act was to take away from the circuit courts jurisdiction in similar cases. This court held this contention to be unsound, and that the jurisdiction conferred upon justices of the peace was not exclusive, but concurrent.

It is also held that a statute providing new methods for the review of judgments of inferior courts does not abolish those already existing; the new ones being simply cumulative. *Fisher v. Baldrige*, 91 Tenn., 418, 19 S. W., 227; *Peck v. Hapgood*, 10 Metc. (Mass.), 172.

The act of 1907 contains no words making the jurisdiction conferred upon the court of civil appeals exclusive in that court; nor is there any provision in that or any other statute repealing the statutes that confer similar jurisdiction upon this court. The general repealing clause of the statute is not effective for that purpose. *Turner v. State*, 111 Tenn., 607, 69 S. W., 774. Nor are these statutes repealed by implication.

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There is no irreconcilable conflict between them and the one in question.

Concurrent jurisdiction, original and appellate, is not a novelty, but very common in our system of jurisprudence. It has been vested in several courts. Justices of the peace and circuit and chancery courts have very extensive and important concurrent jurisdiction. There are cases in which the circuit and chancery courts have concurrent appellate jurisdiction with this court of appeals from judgments of the county courts, with final jurisdiction in this court, as under this act.

There is no repugnancy between the statute conferring appellate jurisdiction upon the court of civil appeals and that vesting it in this court. Appellate jurisdiction to review judgments and decrees of trial courts can consistently exist in both courts under these statutes, with final revisory jurisdiction in the supreme court. Proceedings in error, where the jurisdiction is concurrent, may be taken to either of them at the option of litigants, and the purpose of the act in question thus accomplished.

The majority of the court, however, are of the opinion that it is not now necessary to decide whether the jurisdiction of the two courts is concurrent, and this question is not determined.

We are therefore of the opinion, for the reasons concurred in by the majority; that this court has jurisdiction of this case, and the parties have a right to have it here tried and determined; and it is so ordered.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE. SEPTEMBER TERM, 1907.

J. C. ROGERS *v.* MILLARD AYERS.

(Knoxville. September Term, 1907.)

1. **EXEMPTION FROM DEBT.** Removal of property from State operates as selection of it as exempt, when.

A debtor's removal of his property from this State to another State for the purpose of avoiding the payment of a debt and his failure to turn it over under an execution in place of the property levied on within this State operates as a selection of the removed property as his exempt property.

Cases cited and approved: Robinson *v.* Myers, 3 Dana (Ky.), 441, 442; Loan & Trust Co. *v.* Crabb, 45 Fla., 306.

2. **SAME.** Right to select property levied on as exempt by substituting other property, when.

When property levied on belongs to a class in which there is a certain number exempt from levy for debt, the owner is entitled to select his exempt property from the property levied on, by substituting other property of the same kind owned by him. (*Post*, p. 346.)

Case cited and approved: Pyett *v.* Rhea, 6 Helsk., 137.

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3. **WRITTEN FINDINGS OF FACT.** Additional findings requested after circuit judge makes written findings under request. Where the circuit judge trying a case without a jury makes a written finding of facts under a request therefor, a party may, after such finding is made, properly request certain additional findings to be made. (*Post*, pp. 342, 343, 345, 348.)

Case cited and approved: *Hinton v. Insurance Co.*, 110 Tenn., 113.

4. **SAME.** Same. Evidence reviewed by supreme court where request for additional findings is made and refused.

Where proper requests for additional written findings of fact are made after a written finding of facts is made, under request therefor, by the circuit judge trying a case without a jury, and improperly refused, the supreme court may review the evidence at large, when other material facts are found in the record not included in the findings made. (*Post*, p. 348.)

Case cited and approved: *Hinton v. Insurance Co.*, 110 Tenn., 129.

FROM CAMPBELL.

Appeal in error from the Circuit Court of Campbell County to the Court of Civil Appeals, and Certiorari from Court of Civil Appeals.—G. MC. HENDERSON, Circuit Judge.

ROGERS & ROGERS and H. K. TRAMMELL, for Rogers.

PICKLE, TURNER & KENNEDY, and JOHN JENNINGS, JR., for Ayers.

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MR. JUSTICE NEIL delivered the opinion of the Court.

This was an action of replevin, brought originally before a justice of the peace of Campbell county, for a horse and mule, which had been taken by defendant in error from the plaintiff in error, under an execution in favor of one L. P. Smith.

From the judgment of the justice of the peace an appeal was prayed to the circuit court of the county, and there the case was tried by the court without the intervention of a jury.

At the request of the defendant in error the court below made a written finding of facts substantially as follows:

That the horse and mule replevied were found by the levying officer and levied on in Jellico, Tennessee, and were the only horse stock of any kind that plaintiff in error had within the State; that plaintiff in error was not present when the levy was made, but on his return, when he learned that a levy had been made, he claimed the animals as exempt and demanded their restoration; that plaintiff in error was a resident and citizen of Jellico, Tennessee, and was the head of a family; that in addition to the animals levied on he owned two small mules, known as "bank mules," such as are used in coal mines, but these mules were in Kentucky at the time the levy was made upon the other animals, and had been almost continuously at work in plaintiff in error's coal mine in that State; that these bank mules were kept at work in the Kentucky mine, and, when not actually at

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work, were kept in a stable or barn at the mine, and were never kept in Tennessee, or used for hauling or other work in Tennessee; that these bank mules were still in Kentucky when the plaintiff in error demanded the return of the animals levied on; that plaintiff in error was accustomed to use the animals levied on in hauling coal and other articles in the city of Jellico.

On these facts the circuit judge rendered a judgment in favor of the plaintiff in error.

On the trial in the circuit court, after the facts above mentioned were found, the defendant in error asked the circuit judge to make the following additional findings:

"(1) That plaintiff, J. C. Rogers, fraudulently removed his property to Jellico, Kentucky, from his residence in Jellico, Tennessee, shortly prior to the issuance and levy of the execution in this case, and that said Rogers removed his property as aforesaid for the purpose of evading payment of the judgment on which the execution was issued and levied on the mare and mule in controversy. This request is based upon the testimony of J. C. Rogers, the plaintiff, given on his cross-examination.

"(2) That plaintiff, J. C. Rogers, moved his barn, or, rather, rebuilt his barn, across the State line in Jellico, Kentucky, and stabled all his horse stock in Kentucky, and does now, after the suit was instituted in which the judgment on which the execution levied on the mare and mule in controversy was issued; that

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Rogers' barn in Tennessee was burned on April 24, 1905; that L. P. Smith instituted suit against Rogers in June, 1905, and after August 1, 1905, Rogers built his barn in Kentucky, where he has ever since, and does now, keep his four head of horse stock, the mare and mule in controversy, and the two small bank mules, 'Frank' and a white mule. This request is based on the testimony of L. P. Smith and J. C. Rogers, the plaintiff.

"(3) That prior to the levy of the execution in question, and after the affirmation of the judgment in the supreme court, by defendant, Millard Ayers, on the mare and mule in controversy, plaintiff, J. C. Rogers, frequently rode, in a run, his bank mule, 'Frank' in Jellico, Tennessee; but that since said levy plaintiff, Rogers, has kept said mule 'Frank' in Kentucky. This request is based upon the testimony of J. C. Rogers and L. P. Smith.

"(4) That plaintiff, Rogers, operates a coal mine in Jellico, Kentucky, which mine is about five hundred or six hundred feet across the State line between Tennessee and Kentucky; that in this mine Rogers works his two small bank mules, and from this mine he works the mare and mule in controversy in hauling coal into Tennessee to his customers, and to be loaded on cars in the city of Jellico, Tennessee, for shipment.

"(5) That plaintiff, J. C. Rogers, failed to bring the two small bank mules in his possession at the time of the levy, and tender them, and offer to exchange them

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for the mare and mule in controversy; that, in claiming the mare and mule levied on as exempt, Rogers never offered the officer, Millard Ayers, the two small mules in exchange for the mare and mule claimed as exempt."

The circuit judge declined to make these additional findings.

The case was appealed to the court of civil appeals, and there tried, resulting in a judgment in favor of the defendant in error, and from this judgment the case was brought to this court upon *certiorari*. Errors were assigned here by the plaintiff in error upon the decision of the court of civil appeals, and the defendant in error renewed here his objections to the findings of the circuit judge.

As to the matters covered by the first request, the testimony shows that the plaintiff in error's piano was moved into Kentucky to avoid its subjection to the judgment of Smith. This request, as bearing upon the bank mules, will be disposed of later, in stating our general conclusion from all the evidence.

The matters stated in the second request are found in the evidence.

As to the matters contained in the third request, it is shown in the evidence of the plaintiff in error that he frequently rode the mule "Frank" in a run into Jellico. This was before the execution was issued, but whether it was after the judgment of the supreme court does not appear clearly. We think, however, it may be inferred

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that it was after the affirmance of the judgment, and before the issuance of the execution.

The matters contained in the fourth and fifth requests are found in the evidence.

From the additional facts found taken in connection with those found by the circuit judge, we cannot resist the conclusion that the plaintiff in error built his barn in Kentucky, and kept the bank mules over there, for the purpose of evading the payment of the Smith debt. We are of the opinion that the act of the plaintiff in error in so removing the two small bank mules out of Tennessee into Kentucky, and keeping them in the latter State, and his failure to turn them over under the execution, in place of the animals levied on, must be regarded as a selection of these mules as his exempt property. Of course, when the horse and mule were levied on, the plaintiff in error had the right to select these latter animals as his exempt property; but it became his duty to put other property of the same kind in their place, if he had it. *Pyett v. Rhea*, 6 Heisk., 137. It would not do for him to say that he could not place the other two mules under the execution in lieu of the live stock levied on, on the ground that the said other mules were in Kentucky, as stated. Having removed them into the latter State for the purpose of avoiding the payment of the debt, he must be treated as having selected those mules as his exempt property. In *Robinson v. Myers*, it was said: "The fourth provision in the general execution statute of 1828 (1 St. Law,

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641), whether interpreted according to its letter or to its obvious policy, should be understood as intended to secure to every housekeeper with a family against the claims of judgment creditors, the use of only one work beast. If he has more than one, and for the purpose of eluding his creditors, or for any other purpose, sends all except one beyond the limits of his county, or even this State, he cannot be entitled to the exemption of the only one left at home, because he would then have more than one which he might use, and the statute only intended to secure to him the right to use one; and though an execution debtor, owning more than one work beast subject to the execution, may elect which one he will keep, yet, if one of them only be within reach of the execution, he cannot defeat the creditor's levy on that one, by electing to keep it, whilst he retains the right to control and enjoy the use of another, which he will not substitute under the execution; for if he could do so a beneficent statute, enacted for his protection, might be prostituted as an engine of fraud and evasion, and thus perverted to ends altogether inconsistent with its spirit and policy. As, therefore, the facts in this case conduced to prove that the plaintiff had a work beast which he had carried to Tennessee, and there left, subject to his control at any time, the verdict and judgment in favor of the defendants, in this action of trespass, for selling under execution the only work beast belonging to him in this State, was not without evidence, or contrary to law, and

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should not therefore be disturbed." 3 Dana (Ky.), 441, 442. Likewise, in the recent case of *Fla. Loan & Trust Co. v. Crabb*, it was held that concealment or removal beyond the reach of his creditors of part of his personal property by a defendant in an attachment proceeding, as a preliminary to claiming his right of exemption, would, where the property remained concealed, be treated as a selection *pro tanto* by the debtor of his exemption. 45 Fla., 306, 33 South., 523.

We think both of these decisions are supported by sound reason and common sense.

That the counsel for defendant in error acted correctly in making application for additional findings is apparent from the rules laid down in *Hinton v. Insurance Co.*, 110 Tenn., 113, 72 S. W., 118; and that we may, upon such requests made, review the evidence at large, when other material facts are found in the record not included by the circuit judge, is apparent from the same case. See page 129 of 110 Tenn., and page 121 of 72 S. W.

It results that there is no error in the judgment of the court of civil appeals, and it is affirmed.

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**J. H. BRYAN, Administrator, v. NORFOLK & WESTERN
RAILWAY COMPANY.**

(*Knoxville*. September Term, 1907.)

1. **ATTACHMENT.** Motion to quash, for apparent defect; plea in abatement for defect not apparent.

Where a defect appears on the face of the attachment, it is not necessary that the legal question should be raised by a plea in abatement; but in such a case the proper practice is by a motion to quash. The plea in abatement becomes necessary only where the particular defect is not apparent on the face of the record. (*Post*, pp. 353, 354.)

Code cited and construed: Sec. 5236 (S.); sec. 4217 (M. & V.); sec. 3476 (T. & S. and 1858).

Cases cited and approved: *Parker v. Porter*, 4 Yerg., 81; *Bank v. Fitzpatrick*, 4 Humph., 311; *Bennett v. Avant*, 2 Sneed, 152.

2. **SAME.** Motion to quash, for apparent defects operates as special appearance only, and not as a general appearance.

A motion to quash an attachment for apparent defects made for the purpose of challenging the jurisdiction of the court operates as a special appearance, and not as a general appearance. (*Post*, pp. 354, 355.)

Case cited and approved: *Lumber Co. v. Lieberman*, 106 Tenn., 153.

3. **SAME.** Same. Motion to quash, for failure of affidavit to aver removal of property from the State of the common residence of the parties to be fraudulent.

In a suit by original attachment instituted in our courts by a nonresident against a nonresident, both parties being residents of the same State, to recover damages for a wrongful death, a motion to dismiss or quash the attachment, on the ground that the affidavit therefor did not aver that defendant's property had been fraudulently removed to this State to evade the pro-

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cess of law in the State of their common residence, does not operate as an appearance. (*Post*, pp. 352, 353, 354.)

4. **SAME.** Filing petition to remove cause to federal court, and withdrawing same does not operate as a general appearance. The defendant, having the acknowledged right to make a special appearance for the purpose of filing a petition for the removal of the cause to the federal court, might properly appear and withdraw that petition without being charged with a general appearance. (*Post*, p. 356.)

Cases cited and approved: *Freidlander v. Pollock*, 5 Cold., 491; *Railroad v. Brow*, 164 U. S., 271.

5. **SAME.** Quashing original attachment operates as dismissal of suit.

There is no error in dismissing a suit by original attachment if the attachment is properly quashed, because the effect of quashing the original attachment is to deprive the court of any jurisdiction over the person of the defendant, the inevitable consequence of which is the dismissal of the suit. (*Post*, pp. 356, 357.)

Case cited and approved: *Harris v. Taylor*, 3 Sneed, 539.

6. **SAME.** Quashing ancillary attachment does not operate as dismissal of suit.

The rule in the last headnote is not applicable in the case of an ancillary attachment, for the reason that such attachment is not the leading process; it does not bring the defendant into court; its only office is to hold the property attached under it for the satisfaction of the plaintiff's demand, and quashing the same does not abate the suit. (*Post*, pp. 356, 357.)

Cases cited and approved: *Robb v. Parker*, 4 Heisk., 59; *Templeton v. Mason*, 107 Tenn., 631.

7. **APPEAL.** Review of error involving jurisdiction without assignment of error, when.

Though errors may not be assigned in the supreme court by the successful party, the court, of its motion, will review a question arising on the jurisdiction of the trial court. (*Post*, pp. 357, 358.)

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8. **ATTACHMENT.** One suing for a tort is a creditor in sense of statute allowing attachment by a nonresident against a nonresident, when.

The statute (Shannon's Code, section 5212), requiring as a prerequisite to an attachment that a nonresident creditor shall swear that the nonresident debtor's property has been fraudulently removed from the State of their common domicile or residence to this State to evade the process of law in their State, embraces and comprehends actions by nonresidents who are seeking to impound property in this State for the satisfaction of damages claimed for a tort, and the omission of an averment in the affidavit that the property sought to be attached was removed to this State to evade the process of the law in the State of their domicile is fatal to the validity of the attachment. (*Post*, pp. 352, 353, 358-363.)

Code cited and construed: Secs. 3143, 5211, 5212 (S.); secs. 2424, 4192, 4193 (M. & V.); secs. 1759, 3455 (T. & S. and 1858.); sec. 3455a (T. & S.).

Acts cited and construed: Acts 1715, ch. 48, sec. 9; Acts 1801, ch. 25, sec. 2; Acts 1870-71, ch. 122.

Cases cited and approved: *Williams v. Conrad*, 11 Humph., 412, 418; *Patrick v. Ford*, and *Farnsworth v. Bell*, 5 Sneed, 532; *Vance v. Smith*, 2 Heisk, 343, 350; *Merchant v. Preston*, 1 Lea, 284; *Parker v. Savage*, 6 Lea, 408; *Taylor v. Badoux*, 92 Tenn., 251; *Sanders v. Logue*, 84 Tenn., 364.

Case cited and disapproved: *Langford v. Fly*, 7 Humph., 585.

FROM SULLIVAN.

Appeal in error from the Circuit Court of Sullivan County.—A. J. TYLER, Judge.

Bryan v. Railroad.

HARR & BURROW, for Bryan.

PAGE & FULKERSON and ST. JOHN & SHELTON, for Railroad.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

This is a suit by original attachment to recover damages for the alleged unlawful killing of one Harry Lee Patton, who was employed by the defendant company in the capacity of brakeman and lost his life in a collision near Hull, in the State of Virginia. The suit was brought by the administrator of the deceased, and a writ of attachment was levied on four passenger coaches belonging to the defendant company and impounded in the town of Bristol, Tennessee. It appears from the record that both the plaintiff and defendant are residents of the State of Virginia, and it does not appear that the deceased ever resided in the State of Tennessee, or left any assets in this State. It appears that on the 25th of April, 1906, during the vacation of the court, a petition was filed on behalf of the Norfolk & Western Railway Company to remove the cause to the United States court. Prior to any action on the petition, it was voluntarily withdrawn by the defendant company. When the regular term of the court was convened on the third Monday in May, 1906, a motion was interposed on behalf of the railroad company to dismiss the attachment, on the

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ground that the affidavit therefor did not aver that the property of the defendant in Tennessee had been fraudulently removed to this State to evade the process of law in the State of Virginia. This motion was overruled by the trial judge. It appears that on the 24th of May, 1906, another motion was made on behalf of the railroad company to quash the original attachment herein for the following reasons: (1) The affidavit is insufficient, in that it does not state that Henry Lee Patton, for whom J. H. Bryan sues as administrator, either died in the State of Tennessee or left assets or property in this State, and therefore has no right to prosecute a suit on the pauper's oath. (2) Because an original attachment for a tort cannot be issued upon the pauper oath. The trial judge sustained both grounds of the motion, quashed the attachment, and dismissed the plaintiff's suit.

The first assignment of error is that the court erred in dismissing the plaintiff's suit, because the motion was only to quash the attachment. It is insisted that, if the attachment was properly quashed, it did not necessarily follow that the whole suit should be dismissed on that account.

The contention on behalf of the plaintiff in error is that the defendant company had entered its appearance before the motion to quash the attachment was made, and that the quashing of the attachment was a mere incident of the suit, and did not touch the merits of the

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controversy. The position of the plaintiff in error is that, when the motion was made on behalf of the company to dismiss the attachment because the affidavit did not aver that the property of the company in Tennessee had been fraudulently removed to this State to evade the process of law in the State of Virginia, the company thereby entered its appearance in this suit, and more especially when it afterwards appeared and asked leave to withdraw the petition.

We are of opinion this contention is not sound. The fact that a motion to dismiss was made, and not a plea in abatement filed, would not affect this question. When a defect appears on the face of the attachment, it is not necessary that the legal question should be raised by a plea in abatement; but in such a case the proper practice is a motion to quash. The plea in abatement becomes necessary only where the particular defect is not apparent on the face of the record. Shannon's Code, section 5236, note 1; *Bennett v. Avant*, 2 Sneed, 152; *Parker v. Porter*, 4 Yerg., 81; *Bank v. Fitzpatrick*, 4 Humph., 311.

It is very obvious that both motions on behalf of the defendant company to quash the attachment were made for the purpose of challenging the jurisdiction of the court, and the appearance of the company was only special, and not a general, appearance.

In *Lumber Co. v. Lieberman*, 106 Tenn., 153, 61 S. W., 70, it appears that an order *pro confesso* had been taken against the defendants, which, on their motion, was set

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aside by the chancellor, and the defendants allowed to file a plea in abatement. There was a motion to strike out the plea, because (1) defendants had permitted a *pro confesso* to be taken and thereby submitted to the jurisdiction of the court; (2) they had entered their appearance to make the motion and thereby submitted to the jurisdiction, etc. The court held that entry of appearance was simply for the purpose of contesting the jurisdiction, and not for trial on its merits, and was not a submission to the jurisdiction.

In *Friedlander v. Pollock*, 5 Cold., 491, it was held that an application to remove a cause to the federal court was not such an appearance as would debar the defendant the right of putting in issue the ground of the attachment.

So in *Wabash Western Railway v. Brow*, 164 U. S., 271, 17 Sup. Ct., 126, 41 L. Ed., 431, it was held that the filing of a petition for removal does not amount to a general appearance, but to a special appearance only.

Again, it is insisted that, when counsel appeared for the defendant and moved for leave to withdraw the petition for removal, that act amounted to a general appearance. It is said the defendant, in filing its petition for removal, was pursuing the federal statute, and it is practically conceded that this appearance for that purpose was special; but it is said the defendant, before the petition had been acted on, again appeared in court by attorney and withdrew it. It is argued this was not

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done in pursuance of any federal statute, but was a voluntary abandonment of a right under that statute, and amounted to a voluntary appearance. We do not think this contention sound. The defendant company, having the acknowledged right to make a special appearance for the purpose of filing a petition for the removal of the cause to the federal court, might properly appear and withdraw that petition without being charged with a general appearance. It was at last an appearance for a special purpose, whether for the filing of the petition for removal in the first instance or the withdrawal of that petition in the last instance.

There was no error in dismissing the plaintiff's suit, if the original attachment was properly quashed. The nature of the original attachment is thus explained in *Harris v. Taylor*, 3 Sneed, 539, 67 Am. Dec., 576, as follows:

"In the present situation of the law, the attachment is a proceeding, not only to enforce the appearance of the defendant, but to obtain security for the plaintiff's demand. For the purpose of bringing the defendant into court, it is substituted for ordinary writ or summons and the seizure of the defendant's property by attachment stands in place of personal service, so far as to give jurisdiction to the court to proceed to render judgment in the case. Being the leading process by which it is sought to compel an appearance, the defendant, upon appearing, may plead in abatement, as if brought into court upon ordinary process. He may traverse and disprove the truth of the cause stated as the ground of at-

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tachment. And, as it is alone by seizure of his property that the court can acquire jurisdiction of his person, he may show in abatement of the attachment, . . . and therefore that he is not before the court."

The effect, therefore, of quashing the original attachment, is to deprive the court of any jurisdiction over the person of the defendant, and thus the inevitable consequence is the dismissal of the suit. This is not so as to an ancillary attachment, for the reason that in such cases the attachment is not the leading process, and quashing the attachment does not abate the suit. *Robb v. Parker*, 4 Heisk., 59.

At law an ancillary attachment is sued out in aid of a suit already brought. Its only office is to hold the property attached under it for the satisfaction of the plaintiff's demand. It does not bring the parties into court. *Templeton v. Mason*, 107 Tenn., 631, 65 S. W., 25.

The next question arising is whether the original attachment herein was properly quashed.

In our opinion the trial judge was in error in not sustaining the first motion submitted on behalf of the defendant company. The cause assigned was that the affidavit for the attachment failed to aver that the property of the company in Tennessee had been fraudulently removed to this State to evade the process of law in the State of Virginia. This is a jurisdictional question, and, although errors may not be assigned in this court by the successful party, this court, of its own motion, will re-

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view a question arising on the jurisdiction of the trial court. It is provided by section 5212 of Shannon's Code as follows:

"When the debtor and creditor are both non-residents of this State and residents of the same State, the creditor shall not have attachment against the property of his debtor, unless he swear that the property of the debtor has been fraudulently removed to this State to evade the process of law in the State of their domicile or residence."

As already seen, the affidavit upon which this attachment was sworn out wholly omitted this jurisdictional averment. It is said, however, on behalf of the plaintiff, that this statute is inapplicable in the present case, for the reason that it applies alone to an attachment by a creditor against a debtor, and does not embrace an action of tort to recover damages for personal injuries. What, then, is meant by the terms "creditor" and "debtor," as employed in section 5212 of Shannon's Code? We have several cases in which the term "creditor," as used in the statute against fraudulent conveyances (section 3143, Shannon's Code), has been defined.

In *Langford v. Fly*, 7 Humph., 585, it was held that a party who has a right of action for a tort, as for slander, "cannot be deemed a creditor within the meaning of Acts 1801, c. 25, section 2, until he obtains a judgment, etc. The wrongdoer is in no sense a debtor by reason of the wrong until the judgment of the court shall fix upon him a pecuniary burden for the redress of the wrong."

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The above case was modified by a subsequent ruling in the case of *Patrick, Adm'r, v. Ford et al.*, cited in note to *Farnsworth v. Bell*, 5 Sneed, 532. In that case it was held (1) that a conveyance of property to defeat an expected recovery in an action of tort is fraudulent and void, as well at common law as under the statute of frauds of 1801 (Acts 1801, c. 25, section 2); (2) the term "creditor," as used in Acts 1801, c. 25, section 2, embraces every person having a just demand or right recognized by law to claim a recovery for an injury to person or property. In the course of the opinion Judge McKinney said:

"The practical importance of this question requires, perhaps, that the construction of the statute construed in the case of *Langford v. Fly*, supra, as respects the meaning of the term 'creditor,' should be further considered. The statute declares in substance that every conveyance of lands or goods made 'to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures,' shall be utterly void. Now the question is, in what sense is the term 'creditor' to be understood in this connection. Is it to be taken in the limited and technical sense of a person to whom 'a sum of money is due by certain and express agreement'? 3 Bla. Com., 154. Or is it to be understood in a more enlarged and less technical sense, so as to embrace every just demand or right recognized by law to claim a recovery for an injury to person or property? In the con-

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struction of a statute one of the cardinal rules is that the words used shall, if possible, be so understood as that meaning and effect shall be given to every word; not so much regarding the propriety of language, as the obvious sense in which the words were intended to be understood. If the word 'creditor' is to be restricted, so as only to include debts *eo nomine* and *in numero*, then the word 'damages' is rendered inoperative, as it would seem; there being nothing left, upon that construction, for it to act upon. . . . The term 'creditor,' in Acts 1715, c. 48, section 9, was taken in a much more comprehensive sense than it technically imports, in order to comply with the spirit and policy of the act. *Williams v. Conrad*, 11 Humph., 412, 418. In our view, a conveyance made with intent to defeat a recovery in damages for a breach of contract, or for a tortious act to person or property, is as much in contravention of the statute, and equally void, as if the purpose of the deed were to defeat the recovery of a debt in the proper sense of the term. This construction has the advantage of giving effect to all the words of the act, and of carrying out the obvious intentions and policy of the law."

In *Sanders v. Logue*, 84 Tenn., 364, 12 S. W., 722, it was said as follows:

"It is true, as we have already seen, that a plaintiff in an action of tort commenced is a creditor, within the meaning of our statute prohibiting conveyances with fraudulent intent to defeat creditors (5 Sneed, 532), and so of one in that relation that he is secured in a deed of

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trust which includes 'all creditors' (*Vance v. Smith*, 2 Heisk., 343, 350). But, even in respect to such creditor, after suit brought, it is held that his claim is not a debt within the meaning of our constitution prohibiting impairment of validity of debts," etc. *Parker v. Savage*, 6 Lea, 408,

Acts 1870-71, p. 139, c. 122 (Shannon's Code, section 5212), is an amendment to the general attachment laws found at section 5211 et seq., Shannon's Code. The first section of that act provides that "any person having a debt or demand due at the commencement of an action, or having a claim for damages for a tort, may sue out an attachment at law or in equity," etc.

It is insisted that when the original act was amended, so as to permit nonresidents of this State to avail themselves of our attachment laws, provided the property of the debtor had been fraudulently removed to this State, etc., the amendment was limited to the debtor and creditor class in the strict and technical meaning of those terms. The argument is that, the amendment having been confined to the debtor and creditor class, nonresidents having a claim for damages for a tort are excluded. We do not concur in this construction of the statute. We are not able to perceive any good reason why the legislature, in extending the remedy afforded by our attachment laws, should limit the right to nonresidents who are creditors and debtors in the narrowest meaning of that term, when, as already seen, the original act provides for persons having a claim for damages

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for a tort. We are of opinion that these terms, employed in the amendment, are to be read in the light of the original act, and are to be interpreted in their more enlarged and comprehensive signification, and as including nonresidents who are seeking redress in damages for a tort.

In *Merchant v. Preston*, 1 Lea, 284, it was said by this court, in considering section 5212, Shannon's Code, that:

"Looking to the reason and policy of this act, it was intended to be amendatory to the whole of section 3455 (Shannon's Code, section 5211)."

This language was not used by Judge McFarland in connection with the precise question we are now considering, but generally in respect of the breadth and scope of the amendment.

So in the case of *Taylor v. Badoux*, 92 Tenn., 251, 21 S. W., 522, this section of the Code (Shannon's Code, section 5212) was again under consideration, wherein Judge Snodgrass used this language:

"The act of 1871 regulated only the general practice as to attachments at law or in equity, and permitted them in all cases where property had been fraudulently removed to this State from that of the residence of the parties to evade the process of law in the State of their domicile or residence. . . . It is generally allowed on all claims and in all courts."

Again we remark the last case cited did not adjudicate the precise point arising on the present record, but is

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cited for the purpose of showing how broad the court considered the act.

Without further elaboration, we are content to hold that the act in question was intended to embrace and does comprehend actions by nonresidents who are seeking to impound property in this State for the satisfaction of damages claimed for a tort, and that the omission of an averment in the affidavit that the property sought to be attached was removed to this State to evade the process of the law in the State of their domicile was fatal to the validity of the attachment.

For this reason, and without noticing other questions, the judgment is affirmed.

Patton v. Casualty Co.

NELLIE M. PATTON v. CONTINENTAL CASUALTY COMPANY.

*(Knoxville. September Term, 1907.)***1. INSURANCE COMPANIES. Action by nonresident against a nonresident casualty company, by service of process.**

A nonresident of this State may prosecute a suit in our courts against a nonresident casualty company, lawfully doing business here, on a policy written outside of this State, though the accident and death of the insured both occurred in another State, if proper service of process is made here. (*Post*, pp. 366-375.)

Cases cited and approved: State, ex rel., v. Telephone & Telegraph Co., 114 Tenn., 194, 200; Whitlow v. Railroad, 114 Tenn., 344; Johnston v. Insurance Co., 132 Mass., 432; Abbeville, etc., Co. v. Western, etc., Co., 85 Am. St. Rep., 922, and citations on page 372; State v. Land Co., 106 La., 621.

2. SAME. Acknowledgment of service of process against foreign life insurance company is as binding as actual service thereof.

Under a statute (Shannon's Code, sec. 3292, subsec. 3) requiring every foreign life insurance company doing business in this State to appoint the insurance commissioner its attorney, upon whom legal process may be served, and providing that service upon such officer by the proper officer of the county in which the commissioner may have his office shall be deemed a sufficient service on the insurance company, an acceptance or acknowledgment of service of process by the insurance commissioner is sufficient to bring the company before the court. (*Post*, pp. 372-374.)

Code cited and construed: Sec. 3292, subsec. 3 (S.).

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3. **SAME.** Process in suit of nonresident against nonresident insurance company may be served on insurance commissioner until power is properly revoked.

Under a statute (Shannon's Code, sec. 3292, subsec. 3) providing for the appointment of the insurance commissioner to be served with process against foreign insurance companies, and providing "that the authority thereof shall continue in force, irrevocably, as long as any liability of the company remains outstanding in this State," the liability of the insurance company is not limited to suits on contracts or obligations arising in this State, so long as the power remains unrevoked, though it might be revoked, if the insurance company had no obligations outstanding in this State. (*Post*, pp. 372-374.)

Code cited and construed: Sec. 3292, subsec. 3.

4. **SAME.** Policy does not lapse where premium is deposited according to agreement, but payment is refused by depository after death of insured; premium deducted.

Where, in accordance with the agreement as to the method of payment, the premiums were placed with the railroad company for which the insured worked, and were properly there at the time of the insured's death, and when the insurance company made demand under the agreement, but the railroad refused payment on the ground that the deceased insured was no longer in its service, though it had the money in its hands, the policy did not lapse, and the insurance company could claim only a deduction of the amount of the current premium. (*Post*, pp. 366, 367, 375.)

FROM WASHINGTON.

Appeal from the Chancery Court of Washington County.—HAL H. HAYNES, Chancellor.

Patton v. Casualty Co.

HARR & BURROW, for complainant.

KIRKPATRICK, JOHNSON & MILLER, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

The defendant is a private corporation having its principal office and place of business in the city of Chicago, State of Illinois. Harry L. Patton obtained from defendant a policy of insurance on his life bearing date August 23, 1905. He was at that time a freight brakeman on the Norfolk & Western Railroad, remaining in the service of that company in that capacity until the date of his death, November 10, 1905.

The policy provided on its face for the payment of a weekly indemnity of \$10 in the event the insured should be injured while the contract was in force, and for the payment of the full amount of \$1,000 in the event of the death of the said Harry L. Patton.

After the death of the insured, notice was given and the proof required to be made by the terms of the policy was made and delivered to the defendant. The defendant refused to pay on the ground that at the time of the death of the insured he was in default in the payment of premiums. Thereupon the present suit was brought by his mother, the beneficiary in the policy, claiming to be a resident of Tennessee.

The defendant filed a plea in abatement and also an answer.

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The plea in abatement stated the following as a matter of abatement:

"The complainant is not a resident of the State of Tennessee, nor was she at the time of filing her bill, but was a nonresident thereof; and defendant is a nonresident foreign corporation, and has no local agent or officer in Washington county. This suit is brought to collect the amount of an insurance policy, which policy was written beyond the limits of this State. The insurer, or this respondent, the insured, Harry L. Patton, and the beneficiary, the complainant in the bill, were all at the time nonresidents of and beyond the limits of this State, and the accident which caused the death of the insured, Harry L., occurred in another State, and his death resulting there. Therefore this respondent is not suable in this State, and was only brought here before the court by substitute service of process on Reau E. Folk, insurance commissioner for this State, residing in Nashville, the seat of government, and respondent says that this court ought not to take further jurisdiction of the cause."

The answer filed set up as a defense substantially that the insured was in arrears on his premiums when the accident occurred, and the policy had been forfeited. The plea was set down for argument as to its sufficiency, and was sustained by the chancellor. Thereupon the complainant took issue upon the plea, and an agreement was filed by the parties, to the effect that at the time the suit was brought the insurance company had been doing

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business in Tennessee for more than a year, and was then doing business, and that it had appointed Reau E. Folk, the commissioner of insurance, as its agent to accept service of process.

Evidence was also introduced by the complainant for the purpose of showing that she was, at the time the suit was brought, a resident and citizen of Tennessee, and there was proof to the contrary introduced by the defendant.

Evidence was also introduced by both sides as to the merits of the controversy.

The chancellor decreed in favor of the complainant, rendering a judgment for \$1,094, and from this judgment the defendant appealed to this court and has here assigned errors.

It is insisted for complainant that when the fact was admitted that the defendant was doing business in Tennessee, and had appointed the insurance commissioner as its agent to accept service of process, the plea in abatement became immaterial. As we understand the position, it is that the plea in abatement was probably good upon its face, and properly sustained by the chancellor, but that, when this new matter was brought forward under the replication to the plea, it was shown that Mr. Folk was properly the agent of the insurance company, and might be served with process.

Without passing upon the technical aspect of the matter thus presented, we think the question is open for consideration whether a nonresident holder of an insurance

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policy may sue a foreign insurance company in this State, by having the insurance commissioner to accept service of process.

It is observed that in this state of the question we have assumed that Mrs. Patton was, at the time the suit was brought, a nonresident of the State. In the view we take of the case it is unnecessary that the point shall be determined on the evidence. It suffices simply to treat her as if she were a nonresident suing. The policy of insurance was obtained by the insured in West Virginia, and he was killed there. At the time it was so procured, the mother of the insured was a resident and citizen of North Carolina.

It has long been the custom in this State to permit suits against foreign companies for torts committed outside of this State. *Whitlow v. N. C. & St. L. Ry. Co.*, 114 Tenn., 344, 84 S. W., 618, 68 L. R. A., 503, and cases cited. In *State, ex rel., v. Telephone & Telegraph Co.*, 114 Tenn., 194, 200, 86 S. W., 390, the general proposition is stated that the admission of a foreign corporation to do business in this State is a matter of comity, and not of right, so that, when such corporation enters the State and undertakes to do business here, it becomes amenable to our laws and subject to the jurisdiction of our courts, exactly as a private individual or domestic corporation.

It has always been the custom in this State to permit suits upon contracts, regardless of the place of the cre-

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ation of the contract. In 6 Thompson on Corporations, section 8004, after stating certain cases holding that suits could not be brought by nonresident persons or corporations against foreign corporations upon contracts made and to be performed outside of the State of the forum, although the foreign corporation had an agent in the State on whom the process might be served, the author said:

“Contrary to the foregoing, there are holdings to the effect that when a corporation comes within the State for the purpose of doing business, and appoints an attorney or agent on whom process against it may be served with like effect as if it existed in the State, it may be sued by nonresidents upon contracts made outside of the State in like manner as a natural person may be sued. This view of the law enlarges the operation of statutes under which foreign corporations subject themselves to the jurisdiction of domestic tribunals, so as to give such tribunals jurisdiction over them in respect to all actions, and for all purposes, as corporations.”

In the case of *Johnston v. Trade Ins. Co.*, 132 Mass., 432, referred to in the notes to the section just quoted, it was held that a citizen of Delaware could maintain in a court of Massachusetts, an action against a corporation created under the laws of New Jersey, upon a policy of insurance issued in Pennsylvania upon property in Delaware, and payable to the plaintiff as mortgagee; the New Jersey insurance company having complied with the statutes of Massachusetts entitling it to do bus-

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iness in that State, by appointing the insurance commissioner of the State its attorney, "upon whom lawful processes, in any action or proceeding against the company, may be served with like effect as if the company existed in this commonwealth," and being actually engaged in business within the State of Massachusetts at the time of the commencement of the suit.

In a note to *Abbeville, etc., Co. v. Western, etc., Co.*, 85 Am. St. Rep., 922, it is said:

"The question of jurisdiction is not dependent on the cause of action arising within the State or nation in whose courts redress is sought, nor upon the plaintiff's being a citizen or resident thereof, unless, indeed, some statute makes that question material and controlling. Therefore, if a foreign corporation has placed itself in a position where process issued by the courts of a State or nation can be lawfully served upon it, and such service is made within the territorial limits of the State or nation, its courts are competent to proceed, though the cause of action did not arise within its limits, unless its constitution or statutes prohibit, or, at least, do not sustain, such proceeding. Process having been regularly served upon a foreign corporation, it cannot, any more than when the defendant is a nonresident natural person, defeat the action on the ground either that the plaintiff is a nonresident, or that his cause of action depends on a transaction occurring in another State or country; and this rule is equally applicable, whether the action is for a tort committed, or a contract entered into, beyond the

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jurisdiction"—citing *Williams v. Pope Mfg. Co.*, 52 La. Ann., 1417, 27 South., 851, 50 L. R. A., 816, 78 Am. St. Rep., 390; *Johnston v. Trade Ins. Co.*, supra; *Pullman Palace Car Co. v. Lawrence*, 74 Miss., 782, 22 South., 53; *Mutual Life Ins. Co. v. Nichols* (Tex. Civ. App.), 24 S. W., 910; *United States v. Southern Pac. Ry. Co.* (C. C.), 49 Fed., 297; *Gilbert v. New Zealand Ins. Co.* (C. C.), 49 Fed., 884, 15 L. R. A., 125; *Denver, etc., R. R. Co. v. Roller*, 41 C. C. A., 22, 100 Fed., 739, 49 L. R. A., 77; *Barrow S. S. Co. v. Kane*, 170 U. S., 100, 18 Sup. Ct., 526, 42 L. Ed., 964. See, also, 19 Cyc., 1341, note 66, and cases cited; Clark on Corp. (2d Ed.), p. 630, note 126, and cases cited.

Referring to our statutes which bear specially upon the matter in hand, it is provided, in the requisites for obtaining the right to do business in this State by a foreign insurance company, among other things, that "it shall satisfy the insurance commissioner that it is fully and legally organized under the laws of its State or government to do the business it proposes to transact; that, if a life insurance company, it has on deposit with the treasurer of this State, or with the proper officer of some other State, securities to the actual cash value of at least one hundred thousand dollars, consisting of the bonds of this State, the United States, or the State in which such company is organized, or notes or bonds secured by mortgages on real estate for double the amount, and such companies shall file with the insurance commissioner the certificate of the official with

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whom the securities are deposited, stating the time and amount of each of said bonds, notes, or stocks, and that he is satisfied that they are worth one hundred thousand dollars, and that the deposit is made with him by the company for the protection of all policy holders and creditors in the United States. It shall, by duly executed instrument filed in his office, constitute and appoint the insurance commissioner, or his successor, its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein shall agree that any lawful process against it, which may be served upon its said attorney, shall be of the same force and validity as if served on the company, and that the authority thereof shall continue in force, irrevocably, as long as any liability of the company remains outstanding in this State. Any process issued by any court of record in this State, and served upon such commissioner by the proper officer of the county in which said commissioner may have his office, shall be deemed a sufficient process on said company, and it is hereby made the duty of the insurance commissioner, promptly, after such service of process by any claimant, to forward, by registered mail, an exact copy of such notice to the company." Shannon's Code, section 3292, subsecs. 2, 3.

In the present case the service of process was acknowledged by the insurance commissioner, and on the principles already stated we are of the opinion that the service

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was properly made, and the company was brought before the court.

Special remark is made by counsel for the defendant upon the language in subsection 3, "that the authority thereof shall continue in force irrevocably, as long as any liability of the company remains outstanding in this State." It is argued from this provision that it was intended to limit the liability of the insurance company to suit on contracts or obligations arising within this State. We do not think this construction is sound. It is true that under this provision the insurance company, if it had no obligations outstanding in this State, might revoke the power of the insurance commissioner; but so long as the authority remains unrevoked the insurance commissioner stands as the representative of the insurance company for the purpose of serving process on all rights of action on which the company is amenable to suit. The limitation is not in respect of the kinds of suits which may be brought, but marks only the power of the insurance company to revoke the agency for all purposes.

The question arose in Louisiana in the case of *State v. North American Land Company*, 106 La., 621, 31 South., 172, 87 Am. St. Rep., 309-325, as to the right of a nonresident to sue upon a foreign cause of action, and it was held as we hold it here.

We are of the opinion, therefore, that, even treating the complainant as a nonresident at the time she brought her suit, it might be well maintained by her if her case,

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upon the merits, be made out.

The merits of this controversy are with complainant. No extended discussion is needed upon this part of the litigation. It is sufficient to say that we find from the testimony that, under the method of payment agreed upon between the parties, the insured had fully complied with his duty. The money was to be placed in the hands of the railway company, to which the insurance company was to resort for payment. The money was so placed before the death of the insured, and was there at the time he was killed. At the time of his death the payment was not yet due, under the course of business theretofore practiced between the insurance company and the railway company. Demand was made upon the railway company by the insurance company for payment of the premium, but the railway company had until the 24th of November to pay. In the meantime, on the 10th of the month, the insured had died. On the 24th the railway company, although the money was then in its hands, refused to pay on the ground that the deceased was no longer in its service. The policy matured at the death of the insured. The rights of the beneficiary could not, therefore, be defeated by the conduct, just referred to, of the railway company. All that the insurance company can claim on these facts is a deduction of the amount of the current premium from the sum due on the policy. The chancellor allowed this.

There is no error in the decree of the chancellor, and it must be affirmed.

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STATE, *ex rel.* E. GOUGE, v. T. J. BURROW, City Recorder.

(*Knoxville*. September Term, 1907.)

1. **CONSTITUTIONAL LAW.** Provision to be construed as mandatory, unless contrary conclusively appears.

Constitutional provisions are presumptively mandatory, and no provision shall be construed otherwise, unless the intention that it shall be so construed unmistakably and conclusively appears upon its face. (*Post*, pp. 381-388.)

Constitution cited and construed: Art. 2, secs. 17-21.

Cases cited and approved: *Cannon v. Mathes*, 8 Heisk., 516; *Morrell v. Fickle*, 3 Lea, 79; *State v. McCann*, 4 Lea, 1; *Manufacturing Co. v. Falls*, 90 Tenn., 482; *State v. Yardley*, 95 Tenn., 552; *Telegraph Co. v. Nashville*, 118 Tenn., 1, and cases from other States to be found on pages 382 and 388.

2. **SAME.** Same. Provision as to style of enacting clause of laws is mandatory.

The constitutional provision that "The style of the laws of this State shall be, "Be it enacted by the general assembly of the State of Tennessee," is mandatory, and must be complied with. The word "shall" as here used is equivalent to the word "must." (*Post*, p. 388.)

Constitution cited and construed: Art. 2, sec. 20.

3. **SAME.** Enacting clause styled, "Be it enacted by the general assembly of Tennessee," omitting the words "the State of" before "Tennessee" complies with the constitution.

A statute (Acts 1907, ch. 17) whose enacting clause is styled, "Be it enacted by the general assembly of Tennessee," complies with the mandate of the constitution (art. 2, sec. 20) requiring the style of the laws to be, "Be it enacted by the general assembly of the State of Tennessee." The omission of the

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words "the State of" does not change the legal meaning, as they are but the expression of a legal fact which exists without their use in this provision.

Acts cited and construed: Acts 1907, ch. 17.

Constitution cited and construed: Art. 2, sec. 20.

Cases cited and approved: Swan v. Buck, 40 Miss., 268; Amusement Co. v. Traction Co. (C. C.), 139 Fed., 358.

Cases cited and distinguished: People v. Dettenthaler, 118 Mich., 595; Sjoberg v. Association, 73 Minn., 203; Seat of Government Case, 1 Wash. T., 115; State v. Rogers, 10 Nev., 250; May v. Rice, 91 Ind., 546.

FROM SULLIVAN.

Appeal from the Chancery Court of Sullivan County.
—HAL H. HAYNES, Chancellor.

E. K. BACHMAN and H. T. CAMPBELL, for complainant.

JOSEPH BURROW, A. C. KEEBLER, A. B. WHITAKER, J. H. WELCKER, and JEROME TEMPLETON, for defendant.

Mr. JUSTICE SHIELDS delivered the opinion of the Court.

This is a petition filed by E. Gouge against T. J. Burrow, recorder of the city of Bristol, in the chancery court of Sullivan county, for a *mandamus* to compel the de-

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pendant to issue a license authorizing him to engage in the business of a retail dealer in liquors, wines, beer, and ale in the corporate limits of that city. The decision of the case involves the constitutionality of chapter 17, p. 81, of the Acts of 1907, passed February 1, 1907, and approved February 8, 1907, popularly known as the "Pendleton Law."

The ground of the attack upon the validity of the act is that the enacting clause is not in the form prescribed by section 20, art. 2, of the constitution, providing that "The style of the laws of this State shall be 'Be it enacted by the general assembly of the State of Tennessee,' " in that it omits the words "the State of." The title and body of chapter 17, p. 81, Acts of 1907, are in these words:

"An act to amend section 1, chapter 221, of the Acts of the general assembly of 1899, entitled, 'An act to amend section 2, chapter 167, of the Acts of the general assembly of 1887, to prohibit the sale of intoxicating liquors as a beverage near any schoolhouse, public or private, where a school is kept, whether the school be in session or not,' so as to extend the provisions of said section 2, chapter 167, of the Acts of the general assembly of 1887, and said section 1, chapter 221, of the Acts of the general assembly of 1899, and said section 1, chapter 2, of the Acts of the general assembly of 1903, to towns of not more than 150,000 inhabitants hereafter incorporated.

"Section 1. Be it enacted by the general assembly of

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Tennessee that section 1, of chapter 2, of the Acts of the general assembly of 1903, be amended by striking out the word 'five' in line 5 of said section, and inserting therefor the words 'one hundred and fifty.'

"Section 2. Be it further enacted, that this act shall take effect from and after its passage, the public welfare requiring it."

The acts which this and chapter 2, p. 5, of the Acts of 1903, purport to amend, chapter 167, p. 293, of the Acts of 1887, and chapter 221, p. 474, of the Acts of 1899, prohibited the sale by retail of intoxicating liquors, wines, ale, or beer, as a beverage, within four miles of a school-house, public or private, where a school is kept, whether in session or not, except within the limits of incorporated towns other than those incorporated after the passage of the act of 1899, having a population of not more than two thousand inhabitants by the federal census of 1890, or any subsequent federal census.

The act of 1903 amended that of 1899 by striking out the word "two" and inserting the word "five," so as to make the former act apply to towns and cities thereafter incorporated having a population of five thousand inhabitants; and the present act amends that act by striking out the word "five" and inserting the words "one hundred and fifty," so as to make the prohibition extend to cities and towns incorporated after its passage having a population of not more than 150,000 inhabitants.

The city of Bristol was incorporated by an act of the general assembly passed March 22, 1907 (Acts 1907, p.

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524, c. 180) and approved March 26, 1907, the former charter having been abolished after chapter 17 of the Acts of 1907 was enacted, and comes within the purview of the last act.

E. Gouge, a citizen of Bristol, conceiving chapter 17 of the Acts of 1907 to be void because of the omission above stated in the enacting clause, demanded of T. J. Burrow, recorder, the license required for retailing liquors as a beverage in this State, so as to authorize him to engage in that business in Bristol; he having previously made arrangements to obtain State and county license from the county court clerk of the county. His demand was refused by the recorder, upon the ground that the sale of intoxicating liquors in the city of Bristol since its reincorporation was prohibited by the act in question. Thereupon this petition was filed. The chancellor, on a hearing before him upon petition and a demurrer thereto, sustained the constitutionality of the act and dismissed the petition. The petitioner has appealed to this court and assigns error.

The power of the general assembly to enact the law in question is not challenged and could not successfully be done. The validity of the statutes of which it is amendatory has been sustained by this court, and is not now an open question. *State v. Rauscher*, 1 Lea, 97; *Hatcher v. State*, 12 Lea, 368. The sole ground of attack is that the act was not passed with the ceremony and in the form prescribed by the constitution; that is, that the style of the enacting clause, because of the omission of the words

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"the State of," does not comply with the provisions of the constitution upon this subject.

The first question for determination is the proper construction of section 20, art. 2, of the constitution, above set out. Petitioner contends that it is mandatory, and that nothing short of a literal compliance—the use of the exact words of the provision—will support the validity of a statute.

The defendant insists:

(1) That the enacting clause of the statute involved, when properly construed, does comply fully with the provision of the constitution.

(2) That the provision invoked is directory, and that only substantial compliance is required, and that that is done in this statute.

Constitutions are expressions of the sovereign will of the people, the fountain of all power and authority. The several departments of the government are created and vested with their authority by them, and they must exercise it within the limits and in the manner which they direct. The provisions of these solemn instruments are not advisory, or mere suggestions of what would be fit and proper, but commands which must be obeyed. Presumably they are all mandatory. Certainly no provision will be construed otherwise, unless the intention that it shall be unmistakably and conclusively appears upon its face. The supremacy and permanency of republics depend upon the maintenance of the fundamental law, in its integrity, as written in constitutions adopted by

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the people; and it is the solemn duty of all those temporarily vested with power, in all departments of the State, to do this. The necessities of a particular case will not justify a departure from the organic law. It is by such insidious process and gradual encroachment that constitutional limitations and government by the people are weakened and eventually destroyed. It has been well said:

"One step taken by the legislature or judiciary in enlarging the powers of government opens the door for another, which will be sure to follow, and so the process goes on until all respect for the fundamental law is lost, and the powers of government are just what those in authority please to make or call them." *Oakley v. Aspinwall*, 3 N. Y., 547, 568.

What we have said applies to provisions of the character of the one under consideration. Mr. Cooley, in his great work on Constitutional Law, at pages 93 and 94, says:

"But the courts tread upon very dangerous grounds when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised.

"It is the province of an instrument of this solemn and permanent character to establish those fundamental

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maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument, which, for a time at least, is to control like the government and the governed, and to form a standard by which is to be measured the power which can be exercised, as well by the delegate as by the sovereign people themselves.

“If directions are given respecting times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end, especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication.”

The general assembly is vested with all legislative authority, and within constitutional limitations that au-

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thority is absolute. The constitution, however, has prescribed the form and manner of its exercise. The provisions upon this subject are to be found in article 2 of that instrument, and are as follows:

"Sec. 17. *Origin and Frame of Bills.*—Bills may originate in either house; but may be amended, altered or rejected by the other. No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended.

"Sec. 18. *Of Passage of Bills.*—Every bill shall be read once, on three different days, and be passed each time in the house where it originated before transmission to the other. No bill shall become a law until it shall have been read and passed on three different days in each house, and shall have received on its final passage in each house the assent of a majority of all the members to which that house shall be entitled under this constitution; and shall have been signed by the respective speakers in open session, the fact of such signing to be noted on the journal; and shall have received the approval of the governor, or shall have been otherwise passed under the provisions of this constitution.

"Sec. 19. *When rejected.*—After a bill has been rejected, no bill containing the same substance shall be passed into a law during the same session.

"Sec. 20. *Style of Laws—When to Take Effect.*—The

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style of the laws of this State shall be, 'Be it enacted by the general assembly of the State of Tennessee.'

"No law of a general nature shall take effect until forty days after its passage unless the same or the caption shall state that the public welfare requires that it should take effect sooner.

"Sec. 21. *Journal of Proceedings—Ayes and Noes.*—Each house shall keep a journal of its proceedings and publish it, except such parts as the welfare of the State may require to be kept secret; the ayes and noes shall be taken in each house upon the final passage of every bill of a general character and bills making appropriation of public moneys; and the ayes and noes of the members on any question, shall, at the request of any five of them, be entered on the journal."

These provisions have generally been understood in this State to be mandatory, and all of them, with one exception, that have come before this court for construction, have been held to be of this character. The exception referred to is the provision in section 18 to the effect that the fact that the bill was signed by the respective speakers of the senate and house in open session be noted on the journals. This was held by a majority of the court to be directory, because the phraseology of the entire section was deemed to require such construction. *Home Tel. Co. v. Nashville*, 118 Tenn., 1, 101 S. W., 773.

The provision contained in section 17, that "No bill shall become a law which embraces more than one sub-

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ject, that subject to be expressed in the title," came before the court for construction soon after the adoption of the present constitution, by which it was first made a part of the organic law of the State, in the case of *Cannon v. Mathes*, 8 Heisk., 516, and was held to be mandatory. It is there said:

"The particular portion of this section on which the question in the present case is raised is the following:

"'No bill shall become a law which embraces more than one subject, that subject to be expressed in the title.'

"Similar provisions have been introduced of late years into many of the State constitutions, and frequent occasions have arisen for their construction by the courts. In several States the courts have construed the provisions to be only directory to the legislatures, and held that their acts are not invalid, although not conforming to the directory requirements of their constitutions. But the courts of most of the States have construed the provisions to be mandatory or imperative, and that therefore the acts not passed in conformity therewith are invalid and void.

"The language adopted in our constitution differs in some respects from that used in other States. 'No bill shall become a law which embraces more than one subject.'

"There is a direct, positive and imperative limitation upon the power of the legislature. It matters not that a bill be passed through three readings in each house, on three different days, and has received the approval

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of the governor. Still it is not a law of the State if it embraces more than one subject. It is, therefore, a plain, absolute, and unconditional limitation upon legislative power. But, while it is conceded that a bill which embraces more subjects than one cannot become a law, because of the imperative or mandatory character of the language, yet it is suggested that the remaining portion of the provision, to wit, 'that subject to be expressed in the title,' was not intended to be mandatory, but only directory, and, therefore, that a bill may become a law, although the subject of the bill may not be expressed in the title.

"In the present case we do not deem it necessary to express an opinion whether any provision of a constitution can properly be treated otherwise than as mandatory. The essential nature and object of constitutional law being restrictive upon the powers of the several departments of government, it is difficult to comprehend how its provisions can be regarded as merely directory."

While the provision involved in that case has been liberally construed, so as not to embarrass legislation, yet all subsequent cases involving the question have recognized its mandatory character and the necessity of a compliance with its spirit in the enactment of statutes. *Morrell v. Fickle*, 3 Lea, 79; *State v. Yardley*, 95 Tenn., 552, 32 S. W., 481, 34 L. R. A., 656; *Cole Manufacturing Co. v. Falls*, 90 Tenn., 482, 16 S. W., 1045; *State v. McCann*, 4 Lea, 1.

Provisions similar to those embraced in our constitu-

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tion are to be found in the organic law of almost all the States, and there is a conflict in judicial opinion whether they are mandatory or merely directory. In some States the one under consideration has been held to be mandatory, and a strict compliance with it necessary to the validity of all legislation enacted. *People v. Detten-thaler*, 118 Mich., 595, 77 N. W., 450, 44 L. R. A., 165; *Sjoberg v. Security Savings & Loan Association*, 73 Minn., 203, 75 N. W., 1116, 72 Am. St. Rep., 616; *State v. Rogers*, 10 Nev., 250, 21 Am. Rep., 738; *May v. Rice*, 91 Ind., 546; *Burritt v. Commissioners*, 120 Ill., 322, 11 N. E., 180; *State v. Patterson*, 98 N. C., 660, 4 S. E., 350; *Seat of Government Case*, 1 Wash. T., 115. In other States these provisions have been held to be directory only, and a substantial compliance with them to be sufficient. *Pim v. Nicholson*, 6 Ohio St., 177; *McPherson v. Lennard*, 29 Md., 377; *City, etc., v. Riley*, 52 Mo., 424; *Sicann v. Buck*, 40 Miss., 268.

The provision we are here called upon to construe is in plain and unambiguous words. The meaning of it is clear and indisputable, and no ground for construction can be found. The language is: "The style of the laws of this State shall be," etc. The word "shall," as here used, is equivalent to "must." We know of no case in which a provision of the constitution thus expressed has been held to be directory. We think this one clearly mandatory, and must be complied with by the legislature in all legislation, important or unimportant, enacted by it; otherwise, it will be invalid.

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Having determined this, we are now to decide whether this mandate of the constitution has been complied with by the general assembly in enacting the Pendleton law.

Written laws, in all times and all countries, whether the edicts of absolute monarchs, decrees of king and council, or the enactments of representative bodies, have almost invariably, in some form, expressed upon their face the authority by which they were promulgated or enacted. The propriety of an enacting clause in conformity to this ancient usage was recognized by the several States of the Union after the American Revolution, when they came to adopt constitutions for their government, and without exception, so far as we can ascertain, express provision was made for the form to be used by the legislative department of the State in enacting laws. This was done in this State when it adopted a constitution in 1796, and the same provision then made is to be found in our present constitution, adopted in 1870. / The⁺ purpose of provisions of this character is that all statutes may bear upon their face a declaration of the sovereign authority by which they are enacted and declared to be the law, and to promote and preserve uniformity in legislation. Such clauses also import a command of obedience and clothe the statute with a certain dignity, believed in all times to command respect and aid in the enforcement of laws. These are the sole purposes of an enacting clause. It is not of the essence of the law, adds nothing to its meaning, and furnishes no aid in its con-

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struction. It is a form, but one that is necessary to be used in legislation.

We will now compare the enacting clause provided by the constitution and the one used in this statute. The only difference claimed by the petitioner to be in them is the omission in the latter of the words "the State of." We do not think that this constitutes an appreciable difference, but that they are, in fact and in law, the same—that they are absolutely synonymous.

The sovereign authority they import is the same. They clothe the act with the same dignity, and are equally efficient to promote uniformity in legislation.

It is impossible to point out in the form given in the constitution any element of governmental authority, or shade of human thought, which is not contained in the enacting clause of the statute. No one can read the latter without being impressed with the fact that the statute purports to be enacted by the general assembly of the State of Tennessee.

Tennessee is a sovereign power, and the name, without more, when used in connection with governmental functions, whether in constitutional provision, statutory enactment, or judicial decision, imports sovereignty, as much as do the names of any of the great powers of the world—France, Russia, or Spain. Indeed, so well is this recognized in regard to the names of all the States of the Union that a number of the States, in the enacting clause prescribed by their constitutions, omit the word "State" altogether; that of Alabama being an

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illustration, which is in these words: "Be it enacted by the legislature of Alabama."

The words "the State of" are necessarily and conclusively implied in the phrase "the general assembly of Tennessee." The implication is certain and unavoidable. The omitted words, and those alone, can be implied, and there is no room for any mistake. The two clauses, the one provided in the constitution and the one used in the statute, therefore, may be stated with absolute accuracy to be the same in substance, meaning, and form. Can it, then, be said that the apparent omission of the three words, "the State of," which the human mind involuntarily and with absolute certainty supplies in reading the enacting clause of the statute, when all the purposes of the constitutional provision are accomplished, can have the effect to vitiate a law otherwise duly enacted by the general assembly and approved by the governor of the State? We think not. To hold that it did would be to sacrifice substance to the myth of noncompliance with a form in a matter where every purpose of the framers of the organic law had been fully effectuated. Such an absurd result was not intended and cannot be allowed. While some courts of last resort have held, as we do, that the constitutional provision here invoked is mandatory, yet no case has been called to our attention where a statute has been held void for a failure to comply with that provision, when the enacting clause used necessarily and conclusively expressed the same meaning and had the same effect, although not literally in the form

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used. The statutes held void in the cases of *People v. Dettenthaler*, 118 Mich., 595, 77 N. W., 450, 44 L. R. A., 165, *Sjoberg v. Security Savings & Loan Ass'n*, supra, and the *Seat of Government Case*, supra, had no enacting clause, and are therefore not even analogous to this case. The case of *State v. Rogers*, supra, involved the validity of a statute of the State of Nevada with an enacting clause in these words, "The people of the State of Nevada, represented in assembly, do enact as follows," while that required by the constitution of that State was, "The people of the State of Nevada, represented in senate and assembly, do enact as follows."

The omission here was of one of the two branches composing the legislative body, and the act read as if passed by the other branch alone. In other words, instead of it conclusively appearing that the law was enacted by the proper authority, it appeared that it was not, and it was therefore necessarily void. The case of *May v. Rice*, supra, was a similar one. The constitution of Indiana required the style of the enacting clause to be, "Be it enacted by the general assembly," and the act held void omitted the words "by the general assembly." This was evidently fatal, as all reference to the enacting power was absent. We have not had access to the Illinois and North Carolina cases, and cannot state the nature of the defects in the enacting clauses of the statutes there held void. The case of *Swann v. Buck*, supra, is more in point. The constitution of Mississippi provided that "that style of their [the two houses compos-

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ing the legislature] laws shall be, 'Be it enacted by the legislature of the State of Mississippi.'” The style of the act or joint resolution in question was, “Resolved by the legislature of the State of Mississippi.” In sustaining the statute in that case it is said:

“It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended by the legislative power that enacts it that it should take effect as a law. These conditions being fulfilled, all that is absolutely necessary is expressed. The word ‘resolved’ is as potent to declare the legislative will as the word ‘enacted,’ . . . the requirement of the constitution is thereby substantially complied with, and the will of the legislature sufficiently declared.”

The case of *Montgomery Amusement Co. v. Montgomery Traction Co.* (C. C.), 139 Fed., 358, is also analogous. The constitution of Alabama ordains: “The style of the laws of this State shall be, ‘Be it enacted by the legislature of Alabama.’” The enacting clause of the statute in question was, “Be it enacted by the legislature of the State of Alabama,” and it was insisted that the addition of the words “the State of” rendered the statute invalid. It was held that, while the constitutional provision was mandatory, yet, as the addition of the words “the State of” did not change the meaning, they did not affect the validity of the statute. It is there said:

“The only fault is that the enacting clause goes further than the constitution commands, and declares ‘the

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legislature of Alabama,' which enacted the statute, is 'the legislature of the State of Alabama.' That, however, is but a statement of a legal fact—a consequence which the constitution itself inevitably reads into every act,"

Applying this reasoning of that case to this statute, how can it be said that the words "the State of" are omitted in contemplation of the constitution, when they are but the expression of a legal fact, which that instrument itself supplies and reads into every enacting clause.

We are, for the reasons herein stated, of the opinion that the enacting clause of this statute does comply with the mandate of the constitution in relation to the style of statutes, and that it is a valid and constitutional law.

The decree of the chancellor is affirmed, with cost.

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MCMINN COUNTY v. N. G. ALLEN *et al.*

(Knowville. September Term, 1907.)

1. **ELECTIONS.** Ballot and registration statutes become applicable to consolidated civil districts of the requisite population according to latest census, when.

Where the ballot law (Acts 1890, ex. ses., ch. 24, as amended by Acts 1897, ch. 17) applies to towns, cities, and civil districts having a certain population, as computed by the latest federal census, and the registration law (Acts 1890, ex. ses., ch. 25) applies to civil districts having a certain population, as computed by the latest federal census, and the several civil districts of a county, all under the requisite population, are as units, or each as a whole, united, or consolidated, by statute (Acts 1907, ch. 102) into other civil districts, each having the requisite population, as ascertained by computing or adding together the population of the original civil districts composing each new consolidated district according to its population in the latest federal census made previous to such consolidation, the said ballot and registration laws become applicable immediately upon said consolidation becoming effective.

Acts cited and construed: Acts 1890 (ex. ses.), chs. 24 and 25; Acts 1897, ch. 17; Acts 1907, ch. 102.

2. **SAME.** Ballot law has not been repealed.

The ballot law (Acts 1890, ex. ses., 24, as amended by Acts 1897, ch. 17) has not been repealed by any subsequent act. (*Post*, p. 400.)

FROM MCMINN.

Appeal from the Chancery Court of McMinn County.
—T. M. McCONNELL, Chancellor.

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BURKETT & MILLER, for complainant.

IVINS & MANSFIELD, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed by McMinn county against N. Q. Allen, D. M. Owens, and James Reagan, in their official capacities as election commissioners of the county, for the purpose of enjoining them from acting under the registration law and the Dortch law in the various civil districts of the county, on the ground that there was no lawful authority for so acting, and that the county would be put to the expense of numerous suits by persons who might perform services in putting in force the said two laws referred to and applying them in the county.

The facts on which the litigation is based were agreed to by the respective counsel, and are as follows:

"In this cause it is agreed and admitted that, when the federal census of 1900 was taken, McMinn county was divided into eighteen civil districts, and that said federal census of 1900 shows the population of said civil districts as they existed; and it is further admitted that according to the federal census of 1900 no one of said districts contained as much as 2,500 population.

"And it is further admitted that by chapter 102, p. 284, of the Acts of 1907 of the general assembly of Ten-

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nessee, the second, third, fourth, fifth, sixth, eighth, ninth, eleventh, twelfth, thirteenth, sixteenth, and seventeenth civil districts of McMinn county were abolished, and their territory attached to the remaining districts, as follows: The second and fourth civil districts were made a part of the first district, the fifth and sixth were made a part of the eighteenth district, the twelfth and thirteenth districts were made a part of the fourteenth civil district, the third and eleventh districts were made a part of the seventh district, and the eighth and ninth districts were made a part of the tenth district, and the sixteenth and seventeenth districts were made a part of the fifteenth district.

"It is further admitted that, when said consolidation of said districts was made, their territory was the same as it had been when the federal census of 1900 was taken, and that the population of each of the six civil districts, consolidated as aforesaid by chapter 102, contained more than 2,500 population computed by the federal census of 1900, when said consolidation was made. There is no town, city, or civil district in the county now having, or that at any time has had 9,000 population.

"It is further admitted that the costs of registration sought to be enjoined in this case will exceed \$1,000."

The chancellor disallowed the relief sought as to the registration law, but granted relief as to the Dortch law, and decreed accordingly. From this decree both

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sides appealed to this court, and have here assigned errors.

The Dortch law consists of chapter 24, p. 50, Acts of the Extra Session of 1890, and the amendments thereto contained in subsequent acts, and refers to the ballots and method of voting them. The registration law consists of chapter 25, p. 59, of the Acts of the Extra Session of 1890, and the amendments thereto. These laws need not be stated in more particularity, as they are well known in this State, and their special provisions need not be considered in disposing of the question arising on the inquiry, further than we shall now state.

By chapter 17, p. 141, of the Acts of 1897, the Dortch law was amended, among other things, so as to apply to "towns, cities and civil districts having a population of 2,500 inhabitants or over, computed by the federal census of 1890, or which may hereafter have that number, or over that number, by any subsequent federal census." The original registration law, by its terms, applies to civil districts having a population of 2,500, computed by the federal census of 1880, "or which may hereafter have that number or over, computed by any subsequent federal census."

The question for decision is whether the facts stated show that the civil districts created by the act of 1907 meet the requirements of 2,500 population, computed by the federal census of 1900.

It is insisted for the complainant, in effect, that the word "computation" means enumeration; that is to say

such civil districts must be regarded as they stood in 1900, when the census was taken, and that, inasmuch as no civil district at that time had a population so large as 2,500, the law cannot be applied to any of them.

It is insisted, on the other hand, that inasmuch as such civil districts as existed in 1900 were joined together to make the civil districts in 1907, the adding together of the various populations of the several civil districts which went to compose the civil districts of 1907 is in fact a computation of the population according to the said census of 1900.

We think this latter view is the correct one. The federal census was fixed upon as a ready and convenient means of ascertaining the population of the districts to which the laws referred to should apply. The legislature could have directed a special census to be made for the purpose, but such a course would have been idle when the figures were already at hand, showing that the several civil districts, when thrown into certain groups and thus cast into new units, would make new civil districts of a defined territory, with a population exceeding the amount required by the two laws above mentioned. When these new units were made, the act of turning to the federal census and counting the populations of the original districts composing each new civil district, and adding the several amounts together, was a process of computation under the census.

The foregoing was the only point that was argued before the court on the hearing of the cause, and the only

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one discussed to any extent in the brief filed for the complainant. It was suggested that the original Dortch law was repealed by a subsequent law; but this was put forward in only a tentative way, and the position is without merit, and need not be further referred to.

On the grounds above mentioned, we are of the opinion that the chancellor acted correctly in holding the registration law applicable to the several civil districts of McMinn county, and his decree in this respect is affirmed. We are also of the opinion that he acted incorrectly in holding that the Dortch law did not apply to the said civil districts, and his decree in this respect is reversed.

A decree will be entered here decreeing the rights of the parties in accordance with this opinion.

The complainant will pay the costs of this proceeding.

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T. F. NORMAN, Administrator, v. SOUTHERN RAILWAY
COMPANY.*

(Knoxville. September Term, 1907.)

1. **RAILROADS.** Not liable for death of switchman, for failure of cars to uncouple, on the ground of negligence, when.

A railroad company is not liable, on the ground of negligence, in damages for the death of a switchman killed while employed in the yards for the distribution of freight cars by being thrown from a freight car by a jerk, caused by the conductor's inability to uncouple the cars at the proper moment, on account of a broken link in the coupling pin, a defect not communicated to the deceased, where the failure to uncouple was a very common occurrence well known to the deceased. (*Post*, pp. 406-410.)

2. **SAME.** Same. Conductor's failure to notify switchman of defective coupling chain is not negligence, when.

Where a freight car, equipped with a defective coupling pin chain, was nevertheless one which, in the ordinary course of business, deceased as switchman was required to assist in distributing, it was not incumbent on the conductor to notify the deceased of the defect before attempting to uncouple the car, so that deceased could have protected himself from a sudden jerk of the car, due to the conductor's inability to uncouple the car at once with the lever, especially where the failure to uncouple was a very common occurrence well known to the deceased. (*Post*, pp. 410, 411.)

*As to duty of master to warn servants, see note to *James v. Rodipes Lumber Co.* (La.), 44 L. R. A., 33.

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3. MASTER AND SERVANT. Rule as to safe place and safe appliances does not apply, when.

The general rule that the master must furnish a safe place and safe appliances does not apply, when the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. (*Post*, pp. 411, 412.)

Cases cited and approved: *Heald v. Wallace*, 109 Tenn., 364; *Smith v. Coal & Iron Co.*, 115 Tenn., 543; *Railroad v. Hennessey*, 96 Fed., 713, 38 C. C. A., 307.

4. SAME. Master is not required to warn servants of transitory danger likely to happen at any time, when.

A master is not required to warn his servants of every transitory risk, when the only thing the servants do not know is the precise time when the danger will supervene, nor when the actual danger which causes the injury is due to a transitory occurrence of such a nature that the injured servant knows it will probably happen from time to time. (*Post*, pp. 411, 412.)

5. RAILROADS. Switchman for distribution of defective cars assumes the risks incident to his duties.

A railroad switchman employed in the yards, and charged with the duty of distributing defective cars for repairs, which, by the very nature of his occupation, he must know, or have reason to know, are unsafe and dangerous, he voluntarily assumes the risks and hazards which are incident to the duty he has undertaken to perform. (*Post*, pp. 413, 414.)

Cases cited and approved: *Railroad v. Hennessey*, 96 Fed., 713, 38 C. C. A., 307; *Railroad v. Behymer*, 189 U. S., 468.

6. SAME. Same. And it is immaterial that a car is not marked defective by the inspector, when.

Where it was the duty of a railroad switchman to handle a defective car, whatever its condition, at the time he was killed by being thrown from the car by a jerk resulting from the failure

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of the car to uncouple when expected, where he also knew that, whether it was defective or not, it might not uncouple, and in that case he might expect the jerk, it was immaterial whether the car had been marked by the inspector for the defective coupling pin chain attached thereto or not. (*Post*, p. 414.)

7. **SAME.** Violation of rule by conductor tending to prevent accident cannot be complained of by injured switchman, when. In an action of damages for the death of a railroad switchman caused by a jerk of the car as a result of the conductor's inability to uncouple the car, because the coupling pin chain was broken, it is immaterial that the conductor, in attempting to uncouple the car, violated a rule of the railroad company prohibiting employees from going between the cars when in motion, and directing that, if anything connected with the coupling apparatus was defective, the employee should not attempt to make the coupling, but should make report of the defect. The conductor's violation of the rule could not have contributed in any way to the death of the switchman, but, on the contrary, must have tended to prevent the accident. (*Post*, p. 417.)

8. **SAME.** Declaration not stating a cause of action for the violation of the federal safety appliance act.

Where the declaration for the death of a railroad switchman resulting from a defective coupling pin chain on a freight car avers only incidentally that defendant was a common carrier operating numerous lines of railroad "running to divers places and points in and beyond the State of Tennessee;" but not even averring that the particular car alleged to be defective was being used in interstate traffic, it does not state a cause of action for the violation of the federal safety appliance act prohibiting railroads from using cars in interstate traffic not equipped with automatic couplers obviating the necessity of going between the cars, and providing that there shall be no assumption of risk by any employee injured by going between the cars not equipped according to the act. (*Post*, pp. 417-420.)

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Act of Congress cited and construed: Act March 2, 1893, ch. 196.

Cases cited and distinguished: United States v. Railroad (D. C.), 145 Fed., 438; United States v. Railroad (D. C.), 154 Fed., 897.

9. SAME. Failure to repair automatic coupler before distribution of car constitutes no violation of federal safety appliance act.

The failure to repair a defective automatic coupling pin chain before distributing the car to which it is attached does not constitute a violation of the federal safety appliance act whose provisions are stated in the foregoing headnote, where the discovery of the defect and the injury resulting therefrom occur simultaneously, and where no negligence appears for failure to discover the defect earlier. A reasonable time within which to make the repair will be allowed. If the defect had been observed by the inspector before the car was detached from the train, it would still have been detached and distributed, and repairs thereafter made. (*Post*, pp. 420, 421.)

10. VERDICTS. Directed upon consideration of the entire evidence.

Wherever the jury is directed to return a verdict, it should be upon a consideration of the entire evidence in the case, and not upon any detached portion of such evidence. (*Post*, pp. 421, 422.)

Case cited and approved: Greenlaw v. Railroad, 111 Tenn., 187.

11. SAME. Same. Directed where there is no controversy as to any material fact.

Where there is no controversy as to any material fact, the court may instruct the jury to return a verdict in accordance with his view of the law applicable to such uncontroverted facts. (*Post*, p. 422.)

Case cited and approved: Tyrus v. Railroad, 114 Tenn., 593.

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- 12. SAME.** Motion for peremptory instructions is not addressed to court's discretion, but presents a question of law.

A motion for peremptory instructions is not one addressed to the discretion of the court, but one presenting a question of law as to whether there is any determinative evidence on which the jury must base a verdict in favor of the party who produces it. (*Post*, pp. 422, 423.)

Cases cited and approved: *Traction Co. v. Brown*, 115 Tenn., 329; *Kinney v. Railroad*, 116 Tenn., 451.

- 13. SAME.** Not to be directed where there is any dispute or doubt upon material and determinative evidence and issues.

There is no power in the trial judge to direct a verdict where there is a dispute as to any material and determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence upon the issues to be tried. (*Post*, p. 423.)

Case cited and approved: *Kinney v. Railroad*, 116 Tenn., 451.

- 14. SAME.** Improper application of the rule in directing a verdict is no argument against it.

The fact that the trial judge may sometimes make an improper application of the rule or the fact that there are supposed difficulties in its application because of alleged tendencies of trial judges to encroach upon the province of the jury, constitutes no argument against the soundness of the rule. (*Post*, pp. 423, 424.)

- 15. SAME.** Directed where a servant assumed the risk, and defendant is guilty of no negligence, when; case in judgment.

Where, in an action for the death of a railroad switchman, it appears upon the uncontradicted facts that he assumed the risk as a matter of law, and where the facts are such that all reasonable men must draw the same conclusions from them that the defendant was not guilty of negligence, a question of law only is presented to the court, and it is proper for the trial court to direct a verdict for the defendant. (*Post*, pp. 422, 423, 424.)

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FROM KNOX.

Appeal in error from the Circuit Court of Knox County to the Court of Civil Appeals, and Certiorari from Court of Civil Appeals. JOS. W. SNEED, Circuit Judge.

PICKLE, TURNER & KENNERLY, for plaintiff.

JOUBOLMON, WELCKER & SMITH, for defendant.

MR. SPECIAL JUSTICE HENDERSON delivered the opinion of the Court.

This is an action to recover damages for the death of Henry Lucas, alleged to have been caused by the negligence of the railway company. At the conclusion of plaintiff's evidence before the jury, upon motion of defendant, the trial judge directed verdict in favor of defendant, which was rendered, and judgment was accordingly entered. Motion by plaintiff for new trial having been overruled, he appealed in error to the court of civil appeals, where the judgment of the circuit court was affirmed. The case is now before this court upon *certiorari*.

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The grounds upon which recovery is sought under the declaration is that plaintiff's intestate, Lucas, was employed as a switchman in defendant's yards, where freight cars were distributed, and while in the performance of his duties as such, and without any fault on his part, he was, by a sudden jerk of the train, thrown from the car upon which he stood, and run over and killed." This sudden jerk is alleged to have been caused by the failure of the conductor to uncouple the car upon which plaintiff's intestate stood from the rest of the train. It is alleged that this failure to uncouple was caused, first, by defective coupling appliances, in that the coupling pin was not attached to the lever on the outside of the car, thus rendering it necessary for the conductor to go between the cars and lift the pin; and, second, by the failure of the inspector to discover and indicate the alleged defect, or the failure of the conductor to observe it.

The facts are: The deceased, Lucas, was about twenty-five years of age. He was employed as switchman in defendant's yards at Lonsdale, near Knoxville, and had been so employed and engaged in the work for some three years. These yards were used as a place to make distribution of freight cars to be carried on the various lines of defendant connecting at that point.

When the train of cars arrives at the yards, it is the duty of the inspector to go around and inspect each car. If any are found to be out of repair to the extent that they should be taken out of the train, he indicates this

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by a certain mark placed upon the car. When the conductor and switchmen find a car thus marked, they take it to what is called the "repair track," and there it is left for repairs.

If the inspector finds a car with only slight defects, not sufficient to require the car to go to the repair track, but to be distributed along with the other cars for distribution, he indicates this by a certain other mark, which indicates that the repairers will make the necessary repairs while the car is in the train; the car, however, to be distributed by the conductor and switchmen along with the other cars for distribution, as if it was not marked at all.

The yards are known as "gravity yards." The cars to be detached from the train, are backed up by the engineer to the proper point, where they are uncoupled by the conductor of the yards and allowed to roll down to the proper track, while the switchman rides them and manages the brakes.

Walter Cates was the conductor in charge of the yards on this occasion, and had been for some $3\frac{1}{2}$ years prior thereto. The deceased, Lucas, was the switchman, and, as before stated, had been so employed for some three years, and on different occasions had himself temporarily acted in the capacity of conductor, and was experienced in the business, fully acquainted with the duties. He stood upon the rear end of the rear car to be detached from the train. The train was backed slowly

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up, when Cates stepped up to uncouple the car, that it might roll down the grade.

The train was equipped with couplers constructed with a crank or lever to which is attached a chain fastened to the coupling pin. By the turning or raising of the crank or lever, without going between the cars, the pin is raised and the cars thus uncoupled. On this car the chain had been broken so that the lever did not raise the coupling pin. Cates then went between the cars to raise the pin, but did not succeed in this. The engineer stopped the train, as was usual, when the car upon which deceased stood ran out its slack, as the witnesses say, causing a slight jerk. About this time deceased fell from the car in front of the train as it rolled back, and one wheel ran over his head, crushing his skull, from the effect of which he died.

It was not unusual—the witnesses say that it was a common thing of frequent occurrence—that the conductor would fail for one reason or another to uncouple the car at the first effort, a fact which was, of course, known to the deceased, and that at such times there would be a jerk by the sudden stopping of the car attempted to be detached, instead of rolling on down the grade.

The inspector did not discover this defect in the coupling appliance, or, if he did, he failed to mark the car, or indicate it in any way. The conductor failed to observe the defect, and failed to detect the mistake of the inspector until he attempted to uncouple. It is insisted

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that this negligence of the inspector and conductor, and particularly of the latter, who was deceased's superior and vice principal of the company, was the proximate cause of the death of the deceased, and that such negligence was not one of the risks assumed by deceased in his employment.

It is argued that this risk arose from the neglect of the master to perform his absolute and positive duty to the servant in furnishing safe appliances; that the death of the deceased was the proximate result of the failure of the master, who was represented by the inspector and conductor, to warn the deceased of the existence of a danger well known to the master, and of which the master knew the deceased to be ignorant.

The failure to uncouple, as above stated, the proof shows, was a very common occurrence, a common incident to the service, with which deceased, an experienced switchman, was familiar; and it was clearly his duty to look out and be prepared for such. He knew nothing of the defect in the coupling appliances, it is true; but, from his experience in matters of this sort, he knew that, whether the appliances were defective or not, the conductor might, for some reason, fail to make the uncoupling, and it was his duty to be prepared for such.

Proof of the mere fact that there was a broken link in the chain attached to the coupling pin, so that the lever would not raise it when applied, is not of itself negligence. In this case it was a part of the business of deceased to handle damaged or defective cars. Even if the

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conductor had known of the defect, and had attempted, notwithstanding this, to make the uncoupling, it would not have been actionable negligence on his part to have failed to notify the deceased thereof before attempting to uncouple; for the car, in the ordinary course of the business, would have been distributed as was attempted to be done. The car would have been taken out of the train, even had its defects been such as to require its removal to the repair track; and it was not incumbent on the conductor to notify the deceased of such defects.

The inspection and marking of the cars was not for the warning and benefit of switchmen, but to indicate where they must be taken. Whatever their condition was, it was a part of the duty of the switchmen to handle them. There is more or less danger attached to this.

While it is the general rule that the master must furnish a safe place to work and safe appliances, the rule cannot be of universal application. It is held not to apply in cases of working of mines, when the "very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses." *Heald v. Wallace*, 109 Tenn., 364, 71 S. W., 84; *Smith v. Coal & Iron Co.*, 115 Tenn., 543, 92 S. W., 62.

Discussing the cases on this subject, it is said, in 1 Labatt on Master and Servant, section 268:

"These decisions proceed upon the broad ground that employers cannot be required to warn their men of every transitory risk, when the only thing the men do

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not know is the precise time when the danger will supervene, nor when the actual danger which caused the injury was due to transitory occurrence of such a nature that the plaintiff must have known that it would probably happen from time to time."

The rule requiring the master to furnish safe place and safe appliances is earnestly urged and relied on by counsel for plaintiff. Its inapplicability to facts similar in many respects to those of this case is forcibly and aptly illustrated by the opinion of Judge Lurton in the case of *Chesapeake & Ohio R. R. Co. v. Hennessey*, 96 Fed., 713, 38 C. C. A., 307.

In that case the plaintiff, Hennessey, was employed as a switchman in the defendant's yards, and it was a part of his duty to handle defective cars. He was injured while making a coupling to a damaged car, of which he had no actual knowledge or notice. There were two questions in the case upon which the company's liability depended. The first was whether the company was negligent in permitting the car in question to be and remain in the damaged and dangerous condition it was in when Hennessey in the course of his duty undertook to couple it to another car. Second, whether the company was negligent in not giving to Hennessey notice of that condition before allowing him to make the coupling. On the first question it was held that a switchman employed by the railroad company in its switch-yards at the end of a division, where trains were inspected and defective cars taken out and placed on side tracks for repair or

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removal to the shop, and whose daily duty it is to couple and handle such defective cars, assumes the extra risk due to their defective condition, and which is necessarily incident to his employment. In discussing this question, Judge Lurton uses the following language, which is pertinent to the case under investigation:

"That a railway company is under obligation to its employees to exercise every reasonable precaution to see to it that damaged cars are not admitted into its trains is well established. . . . That employees may ordinarily rely upon this being the case is also elementary. The rule stated is but an application of the general rule that the master personally owes to the servant the duty of using care and caution in providing for his use reasonably safe instrumentalities of service. . . . This, as to railway companies, involves the duty of inspection and of removing from trains all cars found defective. Unless damaged cars are removed from the trains wherein they have become damaged, and placed where they can be repaired, how is the master to provide reasonably safe cars to those servants who are engaged in the operation of his trains, and who have a right to rely upon the master to see that defective cars are not admitted to its trains, or continued in use after they become damaged? The rule is well settled that if the work of an employee consists, in whole or in part, in dealing with damaged or defective cars, and which by the very nature of his occupation he must know, or have reason to know, are unsafe and dangerous, he volun-

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tarily assumes the risks and hazards which are incident to the duty he has engaged to perform. It is not a case where dangerous or defective instrumentalities are supplied by the master to be used in his work, and where notice of such danger should be given, but a case where the instrumentalities to be handled and worked with or upon are understood to involve peril and to demand unusual care. In such cases the risk is assumed by the servant as within the terms of his contract and compensated by his wages."

It can make no difference whether the car was marked by the inspector for the particular defect or not. It was a part of the business of deceased to handle it, whatever its condition. He knew that, whether defective or not, it might not uncouple, and therefore he must look for a jerk, and be prepared for it.

The case of *Railway Co. v. Behymer*, 189 U. S., 468, 23 Sup. Ct., 622, 47 L. Ed. 905, is cited by counsel for plaintiff as an authority upon the question of the assumption by the brakeman of the risk of the jerking of the cars.

In that case there was verdict and judgment in favor of plaintiff in the State court of Texas, and the case was carried to the supreme court of the United States by writ of error. The plaintiff, a brakeman, was ordered by the conductor of a local freight to get upon some cars standing on the siding and to let off the brakes, so that the engine might move them to the main track. The top of the cars was covered with ice, as all concerned

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knew. He obeyed the orders. The engine picked up the cars, moved to the main track, and stopped suddenly. The jerk caused by the sudden stop upset plaintiff. The bottom of his trousers caught in a projecting nail on the running board, and he was thrown between the cars.

Plaintiff's claim is based upon negligence in stopping the car so suddenly, with a knowledge of his position, in slippery condition of the roof and the projection of the nail, which increased his danger and contributed to his fall. Stress is laid by the court upon the fact that by a statute of Texas, if there was negligence, the fact that it was the negligence of a fellow servant was not a defense. The court says:

"The fundamental error alleged in the exceptions to the charge is that the court declined to rule that the chance of such an accident as happened was one of the risks that plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the common-places of the law."

It is insisted by counsel for plaintiff that the Texas statute cuts no figure in the case. We think it was controlling, for the main questions to be submitted to the

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jury were whether the engineer negligently backed the train in view of the peculiar conditions existing at the time, and whether the inspector was negligent in leaving the projecting nail in the running board. If negligence in either of these particulars contributing to the injury be shown, under the Texas statute, the defendant would be liable; and the same rule would apply if the conductor gave a negligent order. So there were very material questions of fact to go to the jury. The court further says:

“No doubt a certain amount of bumping and jerking is to be expected on freight trains, and under ordinary circumstances cannot be complained of, yet it can be avoided if necessary, and, when the particular and known condition of the train makes a sudden bump obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty.”

As the engineer backed the train, Cates, the conductor, was at his place to shift the lever, when he found it was disconnected from the coupling pin. He says:

“And when I got the slack, I reached after the pin as I usually do very often, and when I reached after the pin he [engineer] had just caught the slack against the pin, and I couldn't get it up. . . . And when I reached after the lever, I grabbed for it, but didn't see it; and, when I reached after it, there was so much slack against it that I couldn't pull the pin from the car.”

Had the chain not been broken, he could have lifted

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the pin without going between the cars, and would all the time be in sight of the engineer. When the coupling appliance is in good order, the lever still will not raise the pin, unless he works it just as the slack comes. After the lever failed to work in this instance, he stepped between the cars.

In this connection, plaintiff introduced a rule of the company, the substance of which is to prohibit employees from going between the cars when in motion. If anything connected with the coupling apparatus be defective, the employee must not attempt to make the coupling, but must make report of same. Conductors and yard foremen are required to see that trainmen and yardmen do not violate these instructions.

The fact that the conductor violated the rule of the company, by going between the cars in order to uncouple, cannot affect the merits of this case. By that act he simply took upon himself the risk of injury, and the rule in this particular instance was for his own protection. It could not in any way contribute to the death of deceased, but exactly the contrary; for if, by this, he had succeeded in making the uncoupling, there would have been no jerk of the car.

It is next insisted on behalf of plaintiff that this car was used in interstate traffic, and that the case falls within the federal statute forbidding the use of cars without automatic couplers, and that defendant was negligent in having its employees to handle this car before this coupling was made to comply with the federal stat-

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ute. The statute referred to is Act of Cong., March 2, 1893, c. 196, section 2, 27 Stat., 531 [U. S. Comp. St., 1901, p. 3174]:

"It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 8:

"Any employee of such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employ of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

In support of plaintiff's contention, the two following cases are cited: *United States v. Great Northern Ry. Co.* (D. C.), 145 Fed., 438; *United States v. Southern Pacific Co.* (D. C.), 154 Fed., 897.

Both cases were actions brought to recover penalties provided by the statute. In the former case, the sole question decided is that the act of congress applies to all cars regularly used on any railroad engaged in interstate commerce, not only while actually in use in such commerce, but at all times when in use on such road. The question arose upon demurrer to certain causes of action. Whitson, District Judge, says:

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"To sustain the demurrer would be to hold that it is beyond the power of congress to control the instrumentalities through which interstate commerce may be carried on. But the prerogative necessarily carried with it the authority to prescribe the rules and regulations which shall apply to those engaged in it. Illustrations of the futility of any effort on the part of congress to exercise its constitutional powers in this regard, if the contention made by the defendant can be sustained, are not far to seek. An interstate carrier might haul traffic from one State to another, then transfer it, and from thence transport it, without any of the safety appliances provided by law."

The latter case (*United States v. Southern Pacific Co.*) was also on demurrer. There was prosecution for violation of the safety appliance act, in that the chains connecting the lock pins to the uncoupling levers were broken, or missing, as in the case at bar; and, while it is held that it was no defense that the car was moved by defendant without knowledge of the defects, Wolverton, District Judge, says:

"Admittedly, if a breakage occurs between stations where repair shops are located, and the repairs cannot be made without taking the car to such a place, the company cannot be held liable until it has had an opportunity of making the repair, and in that event it would be justified in hauling the car in the train to the succeeding station where such repairs could be made."

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We have thus referred to these cases, since learned counsel has so earnestly pressed the matter of the applicability of the act in question to this case. But no such case as is contended for is made by the declaration. It is only alleged incidentally that defendant was a common carrier operating numerous lines of railroad "running to divers places and points in and beyond the State of Tennessee." But there is even no averment that the particular car referred to as defective was being used in the carriage of interstate traffic, and thus no notice is given defendant that it will be required to meet the case now contended for. The acts of negligence averred are only those referred to in another connection.

Assuming it to be proven that these cars were used in moving interstate traffic which does not definitely appear in the proof, and that the declaration avers a case under the statute, the statute has no application to the facts of this case. The couplers are shown to be automatic couplers. They were out of repair, and the defect was of such slight character that it could be repaired with the car in the yards, without the necessity of being taken to the shops. Had the defect been observed by the inspector before the car was detached from the train, the car would still have been detached and distributed, and the repairs thereafter made. To do this switching, when the defect is first discovered as the switching is being done, the failure to repair it at once without attempt-

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ing to move the car to another place in the yards would not in any sense be a violation of the statute. No matter how skillfully machinery may be constructed, it will get out of repair, and a reasonable time within which to make the repair will be allowed. In this instance the discovery of the defect is simultaneous with the injury, and there is no evidence that the failure to discover it before the car reached the yards was negligence.

Learned counsel for plaintiff has submitted an exhaustive brief, citing and discussing numerous decisions, state and federal; on the subject of peremptorily directing verdicts. While the practice in this State is of recent origin, it has long been the practice in other jurisdictions, and its beneficial results in reaching an end of litigation have been demonstrated. The proper application of the rule in particular cases to which it is applicable is not in any sense an invasion of the province of the jury, because it cannot be applied if there be any material controverted fact to be found by the jury.

Our first case on the subject is *Greenlaw v. Railroad*, 114 Tenn., 187, 86 S. W., 1072; opinion by Mr. Justice Wilkes, in which it is said:

"There are a number of cases in our books which seem to hold that the practice of directing a verdict does not prevail in Tennessee. Undoubtedly in other jurisdictions the weight of authority is that such a practice is proper and conducive to the prompt and proper determination of legal controversies. . . We think, however, that, wherever the jury is directed to return a ver-

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dict, it should be upon a consideration of the entire evidence in the case, and not upon any detached portion of such evidence."

In *Tyrus v. Railroad*, 114 Tenn., 593, 86 S. W., 1074, Mr. Justice Neil delivering the opinion of the court, it is shown that the trend of our own decisions has been in this direction, and they themselves demonstrate the necessity for the adoption of the rule. The rule as laid down in that case is the legitimate deduction from those decisions:

"The following we conceive to be a sound statement of the matter within the restrictions of our constitution: Where there is no controversy as to any material fact, there is nothing for the jury to find. The question is then one solely of law for the court, and in such a case the court may instruct the jury to return a verdict in accordance with his view of the law applicable to such ascertained or uncontroverted facts. There can be no constitutional exercise of the power to direct a verdict in any case in which there is a dispute as to any material evidence, or any legal doubt as to the conclusion to be drawn from the whole evidence, upon the issues to be tried." *Tyrus v. Railroad*, 114 Tenn., 593, 86 S. W., 1077.

In *Traction Co. v. Brown*, 115 Tenn., 329, 89 S. W., 320, opinion by Mr. Justice Wilkes, it is said:

"A motion for peremptory instructions is not one which addresses itself to the discretion of the court, but one which presents a question of law; and the crucial

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question in the case is whether there is any determinative evidence upon which the jury must base a verdict in favor of the party who produces it.

" . . . When a given state of facts is such as reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered one of law for the court."

In *Kinney v. Railroad Co.*, 116 Tenn., 451, 92 S. W., 1116, it is said:

"There is no power in the trial judge to direct a verdict in any case in which there is a dispute as to any material, determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence upon the issues to be tried."

Learned counsel for plaintiff lays stress upon the decisions relating to this practice of the United States circuit court of appeals of the sixth circuit, stating that they can be safely followed. A number of the cases of that court are collated and discussed, and it appears from them, which counsel admit, that there is no conflict between the decisions of that court and of this court.

It is alleged that one of the chief difficulties in the application of the rule is the disposition of the trial judge to weigh the evidence, pass upon its value, and thus invade and encroach upon the just province of the jury. The fact that the trial judge may sometimes make im-

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proper application of a proper rule of practice can surely constitute no argument against the rule. The same may be said of many other rules.

We think that upon giving to the evidence in this case the construction most favorable to the plaintiff, and from that evidence and the inferences justly to be drawn therefrom in his favor, there was no controverted question of fact to be submitted to the jury, and that the judgment of the law upon the whole evidence is that plaintiff has not made out a case of negligence against defendant. Such is pre-eminently a proper case for the trial judge to direct a verdict in favor of defendant. And the judgment of the court of civil appeals, affirming the judgment of the circuit court, is affirmed.

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G. L. PRICE *et ux.* v. R. T. CLAPP.*

(Knoxville. September Term, 1907.)

1. **VERDICT.** Not set aside in supreme court for no evidence when there is some evidence to support it.

Where the testimony furnishes some evidence to support the verdict of the jury, it will not be set aside in the supreme court on the ground that there is no evidence to support the same. (*Post*, pp. 429, 430.)

2. **LIBEL.** Evidence of other similar acts is incompetent, and its admission is reversible error.

In an action for libel alleged to have been committed by an anonymous letter written by the defendant, charging the plaintiff to be dishonest, evidence that defendant had previously admitted the writing of other anonymous letters, and had represented herself as being "something like a white cap," was incompetent as irrelevant to the issues, and was inadmissible to show knowledge, intent, and purpose, under the rule admitting evidence of other offenses in certain criminal cases for the purpose of showing guilty knowledge or intent. (*Post*, pp. 430-432.)

3. **EVIDENCE.** Admission of incompetent evidence not clearly harmless, but prejudicial, is reversible error.

Where it is not clear that defendant was not prejudiced by the erroneous admission of incompetent evidence, but, it seems, that the evidence very clearly influenced the jury and added materially to the amount of the damages awarded, its admission constitutes reversible error. (*Post*, pp. 431, 432.)

Cases cited and approved: Lowry v. Railroad, 117 Tenn., 507, 515, and the cases there cited.

*As to evidence of other crimes in criminal case, see note to *People v. Molineux* (N. Y.), 62 L. R. A., 193.

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4. **LIBEL.** Rule of nominal damages does not apply where plaintiff was humiliated, though not discharged from his employment for some time.

In an action for libel for writing an anonymous letter to plaintiff's employer, charging the plaintiff to be dishonest, and resulting in his being immediately denied the confidence of his employer and in his being humiliated, the rule of nominal damages does not apply, though he remained in his employment for some time thereafter. (*Post*, p. 432.)

5. **SAME.** Punitive or vindictive damages may be allowed, when in an action for libel, where the charge imputes moral turpitude, punitive or vindictive damages may be allowed. (*Post*, pp. 432, 433.)

Case cited and approved: *Saunders v. Baxter*, 6 Heisk., 384.

6. **SLANDER.** Wife cannot be sued for slander uttered by her without the joinder of her husband.

For a slander uttered by the wife alone, without her husband's knowledge, or participation, she cannot be sued alone, but must be sued jointly with her husband, who must be joined with her for the sake of conformity. (*Post*, p. 434.)

Case cited and approved: *Lee v. Atchley*, MS.

7. **SLANDER.** Husband is liable for compensatory damages only, and not for punitive damages, for slander uttered by wife, in action against both for her slander.

For a slander uttered by the wife without her husband's knowledge or participation, in action against them jointly, he is liable for compensatory damages only, and not for punitive or vindictive damages, though she may be liable for the punitive or vindictive damages. (*Post*, pp. 433-435.)

Case cited and approved: *Lee v. Atchley*, MS.

8. **TORTS.** Solid verdict against all joint tort feorsors, when.

As a general rule, a verdict which distributes the liability between joint tort feorsors, according to jury's impression as to the

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varying degrees of culpability of the respective parties, is not proper, on the ground that all who participate are equally liable to the injured person for the entire amount of the verdict. (*Post*, p. 435.)

Case cited and approved: Railroad v. Jones, 100 Tenn., 512.

9. LIBEL. Husband is liable with wife for compensatory damages, but not for punitive damages for which she is liable.

In an action against the husband and wife for a libel committed by the wife alone, they are both jointly liable for the compensatory damages, for which the wife is liable, and she alone is liable for the additional exemplary or punitive damages properly allowable, and verdicts and judgments should be framed accordingly. (*Post*, pp. 432-437.)

Code cited and construed: Secs. 4700, 4701, 4702 (S.); secs. 3686, 3687, 3688 (M. & V.); secs. 2972, 2973, 2974 (T. & S. and 1858).

Cases cited and approved: Darwin v. Cox, 5 Yerg., 257; Carpenter v. Lee, 5 Yerg., 266; Railroad v. Gore, 106 Tenn., 390; Lee v. Atchley, MS.; Wilson v. Freedley (C. C.), 125 Fed., 962; 129 Fed., 835; Hill v. Duncan, 110 Mass., 238; Austin v. Wilson, 4 Cush., 273; Smith v. Taylor, 11 Ga., 20; Baker v. Young, 44 Ill., 42, 47; Zeff v. Jennings, 61 Tex., 458.

FROM KNOX.

Appeal in error from the Circuit Court of Knox County to the Court of Civil Appeals, and Certiorari from the Court of Civil Appeals.—JOS. W. SNEED, Circuit Judge.

Price v. Clapp.

SHIELDS, CATES & MOUNTCASTLE, for Price.

ROBERTS & HARRIS, for Clapp.

MR. JUSTICE NEIL delivered the opinion of the Court.

R. T. Clapp brought this suit in the circuit court of Knox county against G. L. Price and his wife, Annie B. Price, to recover the sum of \$5,000 damages alleged to have been suffered by the plaintiff Clapp by reason of an anonymous letter averred to have been written by Price and wife to Clapp's employer, one Crouch, in which the writer is alleged to have charged Clapp with being a thief. The declaration charges in substance:

(1) That on or about the 19th day of March, 1906, the defendants, Price and wife, wrote and mailed to Mr. Will Crouch the following letter, to wit:

"I understand R. Clapp is at work in your flower establishment. I want to give you a little warning. You better arrange money affairs so he cannot handle any cash. If you do, you will come up short. I know what I say."

(2) That the letter so addressed to Will Crouch was intended for, and was in fact delivered to, one Arthur Crouch, plaintiff's employer, and that by R. Clapp was meant the plaintiff, R. T. Clapp, who was then in the employ of the said Arthur Crouch.

(3) That by the letter the defendants intended to charge, and did charge, and assert falsely, that the plaintiff below was dishonest and was a thief.

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(4) That, by reason of the writing and publication of the libelous letter, plaintiff was discharged and turned out of his position, and brought into public disrepute.

The defendants, Price and wife, pleaded the general issue of not guilty.

The case was tried in the circuit court before a jury and resulted in a verdict against the defendants, G. L. Price and his wife, Annie B. Price, for the sum of \$1,000. A motion for a new trial was entered, and was overruled by the court, and thereupon the case was appealed to the court of civil appeals, and in that court the judgment of the court below was affirmed, and the case was brought to this court by the writ of certiorari.

The errors assigned are as follows:

First, that there is no evidence to support the verdict; second, that the trial judge erred in permitting the witness Mrs. R. T. Clapp to testify, over the objection of G. L. Price and wife, that Mrs. Price admitted to the witness that she had written anonymous letters other than the one sued on to one of her nephews-in-law and his mother; third, because the damages are excessive, indicating passion, caprice, and prejudice on the part of the jury; fourth, that the circuit judge erred in charging the jury that they might award punitive damages.

The first error assigned is overruled. We are of the opinion that the testimony both of Mr. Clapp and his wife furnishes some evidence that the letter complained of was written by Mrs. Price.

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The second assignment is based upon the admission of the following evidence to the jury over the objection of the plaintiffs in error:

"Q. Did Mrs. Price ever admit to you about writing other anonymous letters? A. Yes, sir. Q. I will ask you if she ever told you who she wrote them to. A. Yes, sir; she did. Q. What relation to her, if any, were the people she wrote them to? A. One was a nephew-in-law. Q. Is that the same relation Mr. Clapp is? A. Yes, sir; and the other one was his mother. Q. What did she represent herself as being? A. Something like a white cap."

This evidence was objected to because irrelevant to the issue in this case. The objection was overruled by the circuit judge, and the witness was permitted to answer as above.

We are of the opinion that this testimony was incompetent on the ground stated in the objection. It was certainly wholly immaterial to the determination of the issue before the court whether Mrs. Price had written other letters or not. An effort is made to sustain the competency of the evidence on the theory of those cases wherein evidence of other crimes committed by a person on trial in a criminal case is allowed to go to the jury for the purpose of showing knowledge, intent, and purpose in respect of the particular kind of acts under examination in the cases referred to. We think the principle applied in the cases instanced is wholly inapplicable to the present controversy. Here there can be no doubt

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whatever of the intent or purpose with which the letter was written, nor is there any question of a scheme or plan. The only matter of inquiry under the evidence was whether Price and wife were guilty of writing this letter. Considering this letter, the fact that she had written other letters to other people could be of no sort of importance, and could throw no light whatever upon the question. The court of civil appeals in its opinion said in substance, that the evidence was incompetent, but its admission would not be sufficient ground for reversal, inasmuch as it could not have harmed the plaintiffs in error. We think this was an incorrect view. The rule upon this subject is that where incompetent evidence has been admitted, and this court can clearly see that in no aspect of the case could the parties objecting have been injured by such testimony, then there can be no reversal for the error in admitting it. The cases upon this subject will be found collected in *Lowry v. Railroad*, 117 Tenn., 507, 515, 101 S. W., 1157, et seq. Not only can we not be so certain that there was no injury inflicted, but it seems very clear to us that the evidence referred to was very harmful to the plaintiff's in error, since it no doubt inflamed the jury, and added materially to the amount of damages which they allowed. This evidence placed the plaintiffs in error, or, rather, Mrs. Price, before the court and jury in the aspect of a common libeler, who should not only be compelled to respond to the injury done to the defendant in error,

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but should be punished for her other infractions of good order against other persons.

The second assignment is therefore sustained.

As to the third assignment, we deem it proper to say only this: Since the judgment must be reversed, and the cause remanded to the lower court for a new trial, for the error mentioned in the second assignment, and for that mentioned in the fourth assignment, which we shall presently consider, we do not deem it necessary or proper to pass upon the evidence as to the amount of the verdict further than to say that we do not think the suggestions contained in the brief under the third assignment, to the effect that only nominal damages should be allowed, can be entertained. It is true that Mr. Clapp, remained with Mr. Crouch as his employee for some time after the letter was received, still it was testified to by Mr. Clapp that the keys were immediately taken from him, and he was thus denied the confidence of his employer, and humiliated. We do not think that under such circumstances a verdict for mere nominal damages would be sufficient.

Under the fourth assignment, objection is made to the charge of the circuit judge upon the subject of punitive damages. The portion of the charge to which objection is raised is in the following language:

"In the event you find for the plaintiff in this case, you can also award punitive or vindictive damages. In other words, any charge that imputes moral turpitude is a case that the jury may in its discretion and under the

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facts and circumstances of the case award punitive or vindictive damages, which is measured by no other rules than by considering all the facts of the case, and such damages as the jury thinks ought to be awarded that would deter any others from the commission of a like offense."

It is not denied by counsel for the plaintiffs in error that in general punitive damages may be allowed in this class of cases, and it has been so held in the case of *Saunders v. Baxter*, 6 Heisk., 384. The point, however, of the objection is that the husband was not liable for punitive damages, and that the charge quoted was erroneous as to him..

We had this question before the court at the September term, 1904, at this place, in the case of *Thomas Lee & Wife v. Adelia C. Atchley, by Next Friend* (memorandum case). In that case, in an opinion delivered by Beard, C. J., it was said:

"There is no doubt that in a case where such damages are proper evidence of the pecuniary condition of the wrongdoer may be given. *Dush v. Fitzhugh*, 2 Lea, 307; *Cumberland Tel. & Tel. Co. v. Poston*, 94 Tenn., 698; 30 S. W., 1040. But this is not that case. This suit is brought against the husband and wife for slanderous words alleged to have been spoken by her. It is neither averred in pleading or pretended in evidence that the husband counseled or connived at their utterance. The declaration alleges that the wife did the wrong. This

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is the case which the plaintiff himself made. If the declaration had alleged that it was done by the wife in the husband's presence, or upon his demand, it would have been demurrable by the wife. It is because the wrong complained of is the wife's independent and personal act that she can be sued at all. It is well settled that the husband is not joined as defendant in such cases on the ground that the wife's misconduct is imputable to him, but for conformity's sake. His being a defendant results not from his participation in the wrong, but from the fact that the existence of the marriage relation makes it impossible for the injured party to sue the wife alone. To reach her, the husband must be joined in the action. If the wife is found guilty, notwithstanding his innocence, the law visits the consequences on his head, as well as hers. But, where this is the case, does not the violated law exact all to which it is entitled when it exacts from this innocent party full compensation for the wrong inflicted by the wife? Upon what reasonable ground can it be maintained that he should be compelled to answer in exemplary damages? These are allowed for a wanton and flagrant wrong. Why, then, should they be required of one absolutely blameless, and only held liable on technical grounds? So it is, we think, the weight of authority and of sound reason that the damage recoverable against him is compensatory, and that vindictive damages will not be allowed. Newell, p. 365, and cases cited."

This would, of course, not preclude a judgment

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against the wife herself for punitive damages, and there could be no objection to having the verdict show how much was assessed on this head.

It has been held in this State, in accordance with the weight of authority everywhere, that a verdict is not proper which distributes the liability between joint tortfeasors according to the jury's impression as to the varying degrees of culpability of the respective parties, but that all who participate are equally liable to the injured party, and he is entitled to a solid verdict against all the guilty ones. *Railroad v. Jones*, 100 Tenn., 512, 45 S. W., 681. It has been held, however, that, where one of the defendants is found not guilty, a verdict may be rendered in favor of that one, and at the same time a verdict against the guilty one in favor of the plaintiff in the action. *Darwin v. Cox*, 5 Yerg., 257; *Carpenter v. Lee*, 5 Yerg., 266. And it has been held in *Street Railway Co. v. Gore*, 106 Tenn., 390, 61 S. W., 777, that, where several tortfeasors sued jointly, a new trial may be granted as to one, and there may be an appeal as to another, and the judgment enforced against the latter. But, coming more closely to this special question, it has been held that there may be separate findings in the verdict, as to different elements of recovery, against the same defendant even. *Wilson v. Freedley* (C. C.), 125 Fed., 962, and *Id.*, 129 Fed., 835; 22 Am. & Eng. Encyc. of Law, 913, and notes thereto.

It is true that the husband is liable for the wife's libel (*Hill v. Duncan*, 110 Mass., 238; *Austin v. Wilson*, 4

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Cush., 273, 50 Am. Dec., 766), but she is also liable as a very real party. (*Smith v. Taylor*, 11 Ga., 20; *Baker v. Young*, 44 Ill., 42, 47, 92 Am. Dec., 149), and in Texas it is held that as between husband and wife, where a judgment has been rendered against them for damages occasioned by the wife's slander, if the husband in no way participates in the wrong, the separate estate of the wife will be applied to the payment of the judgment, and, if her property is not sufficient, then resort will be had to the common estate, after which the separate estate of the husband may be taken. *Zeliff v. Jennings*, 61 Tex., 458.

Under the rule above announced in *Lee and Wife v. Atchley*, we see no objection to a verdict against the husband and wife for their joint liability, and against the wife for such additional amount as the jury may think proper on the basis of punitive damages, and the framing of the judgment accordingly. In Shannon's Code it is laid down:

"Sec. 4700. Judgment may be given for or against one or more of several plaintiffs, or for or against one or more of several defendants.

"Sec. 4701. In such case, the verdict shall be as the right may appear, and shall state separately any amount allowed to any of the parties.

"Sec. 4702. Such and so many judgments—joint, separate and cross—may be rendered as may be necessary to the rights of the parties, or one amount may be set off against another and judgment rendered for the residue,

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or judgment may be rendered for the defendant against the plaintiff for any amount or balance for which it is found that the plaintiff is liable.”

For the errors committed in respect of the matters mentioned in the second and fourth assignments, the judgment of the court of civil appeals, and of the circuit court must be reversed, and the cause remanded to the circuit court for a new trial.

Knoxville v. Gass.

MAYOR AND ALDERMEN OF KNOXVILLE v. W. H. GASS.

(Knoxville. September Term, 1907.)

1. **CONSTITUTIONAL LAW.** Title of a legislative bill expressing a general subject need not express the means or instrumentalities of accomplishing the purpose of the act.

If one general subject is expressed in the title of an act, it is not necessary that all the means or instrumentalities by which the general purpose of the act is to be accomplished shall appear, either in the title or the body of the act, provided the subsidiary matters are germane to the general subject expressed in the title. (*Post*, pp. 440-457.)

Constitution cited and construed: Art. 2, sec. 17.

Cases cited and approved: Cannon v. Mathes, 8 Heisk., 505, 519; State v. Lasater, 9 Bax., 584; State v. Fickle, 3 Lea, 79; State v. Yardley, 95 Tenn., 546; McElwee v. McElwee, 97 Tenn., 649; Ryan v. Terminal Co., 102 Tenn., 128; State v. Brown, 103 Tenn., 454; State v. McMinnville, 106 Tenn., 384; Carroll v. Alsup, 107 Tenn., 266; Condon v. Maloney, 108 Tenn., 83; State, ex rel., v. Hamby, 114 Tenn., 363, 364.

2. **SAME.** Same. Title of a legislative bill may be broader than the subject of legislation enacted. when.

The constitutional provision that "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title," does not apply to the title, but to the body of the bill. It is no objection to the bill that its title is broader than the legislation contained in its body, or covers, or can be construed to cover, other subjects of legislation, if the real subject of legislation is therein expressed and not obscured by foreign matters. (*Post*, p. 451.)

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Constitution cited and construed: Art. 2, sec. 17.

Case cited and approved: State, ex rel., v. Hamby, 114 Tenn., 364.

3. **SAME. Same. Same.** Issuance of bonds for municipal purposes is the subject expressed in the title and body with fuller details; case in judgment.

A statute (Acts 1907, ch. 361) whose caption and body authorize certain municipalities to issue a certain amount of bonds with which to fund the floating debts of said cities, to increase and improve the fire departments, to widen the streets, and to pay damages to property holders caused by the erection of viaducts and bridges; and also authorize said cities to issue another certain amount of bonds with which to build sewers, contains in its caption and body but one subject of legislation, namely, the issuance of bonds for municipal purposes, and therefore, it is not unconstitutional as violative of the constitutional provision that "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

Acts cited and construed: Acts 1907, ch. 361.

Constitution cited and construed: Art. 2, sec. 17.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOS. W. SNEED, Chancellor.

J. W. CULTON, City Attorney, and S. G. HEISKELL, for
Knoxville.

JNO. W. GREEN, for Gass.

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MR. JUSTICE MCALISTER delivered the opinion of the Court.

This case was presented to the chancellor on a stipulation of agreed facts in accordance with the provisions of section 5206 of Shannon's Code, and the only question for determination is in respect of the constitutionality of chapter 361, p. 1203, of the Acts of 1907, entitled:

"An act to authorize municipalities of Tennessee having a population by the census of 1900, or any subsequent federal census, of not less than thirty thousand nor more than forty thousand, to issue \$165,000 of coupon bonds, with which to fund the floating debts of said cities, to increase and improve the fire department, to widen the streets, and pay damages to property holders caused by the erection of viaducts and bridges; also to authorize said cities to issue \$15,000 of coupon bonds with which to build sewers.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that all municipalities in Tennessee having a population by the federal census of 1900 or any subsequent federal census of not less than 30,000 nor more than 40,000, be, and they are hereby authorized and empowered to issue in their corporate capacity coupon bonds, to be signed by the mayor and countersigned by the recorder, in the manner and under the restrictions hereinafter provided to the amount of one hundred and sixty-five thousand dollars (\$165,000), to be appropriated to fund the floating debts of said cities, increase

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and improve their fire departments, widen streets, and pay damages to property holders caused by the erection of viaducts and bridges: provided, that said bonds or proceeds thereof shall be issued exclusively for the purpose above set out and in such manner within the corporate limits of said cities as may hereafter be determined upon by the mayor and aldermen of said cities.

"Sec. 2. Be it further enacted, that the cities aforesaid shall be, and they are hereby, authorized and empowered to issue an additional sum of fifteen thousand dollars (\$15,000) in bonds for the purpose of building sewers, which bonds shall be signed by the mayor and countersigned by the recorder, and the proceeds thereof shall be used exclusively for the purpose of building sewers and at such points in said cities as may be hereafter determined upon by the board of mayor and aldermen of said cities.

"Sec. 3. Be it further enacted, that the bonds issued under the first and second sections of this act shall be of such denomination and bear such rate of interest not to exceed four and one-half per cent. as may be determined upon by the mayor and aldermen of said cities, and said bonds shall be issued, payable at the end of thirty years from date of issuance, and interest and principal shall be payable in gold at such places within or without the State of Tennessee as the mayor and aldermen of said cities may determine, and the interest shall be payable at such times as the mayor and aldermen may deter-

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mine, and said bonds shall recite the date of issuance, the date of maturity, the fact that a special tax has been authorized to be levied to create a sinking fund for their payment, and shall include such other matters of law or fact as the mayor and aldermen of said cities may determine to be essential to protect the respective interests of said cities and the purchasers of said bonds, and said bonds shall be sold by the mayor and finance committee of said cities.

"Sec. 4. Be it further enacted, that the bonds provided for and issued under this act shall in no case be sold for less than par, and the coupons attached thereto shall at maturity be received by the mayor and aldermen of said cities for all taxes due said cities, except sinking fund taxes levied for the retirement of this or any other bond issue of said cities and except for school taxes.

"Sec. 5. Be it further enacted, that as soon as the bonds herein authorized or any portion thereof shall have been issued thereunder the mayor and aldermen of said cities shall provide by ordinance a sinking fund wherewith to retire said bonds, and said funds shall be used exclusively for sinking fund purposes, and be sufficient, with its accumulations, as nearly as may be estimated, to meet and retire the principal indebtedness at maturity, and said sinking fund shall be intrusted to the management of the sinking fund commissioners now existing in said cities or may hereafter be appointed from time to time.

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"Sec. 6. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are hereby, repealed, and that this act take effect from and after its passage, the public welfare requiring it."

It may be observed that this act, while passed in the form of a general law, is only applicable, on account of its limitations as to population, to the city of Knoxville.

In accordance with the provisions of the act, the mayor and aldermen of the city of Knoxville have issued said series of bonds, the validity of which has been challenged on the ground that the title to said act embraces more than one subject and is therefore violative of article 2, section 17, of the constitution of Tennessee, which provides: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The legal criticism on the title is that it provides for the issuance of \$165,000 of coupon bonds to fund the floating debts, to increase and improve the fire departments, to widen streets, and pay damages to property holders caused by the erection of viaducts and bridges and that the enumerated purposes for which this series of bonds may be issued constitute one subject, and that the title then proceeds to introduce another subject in the following clause: "Also to authorize said cities to issue fifteen thousand dollars of coupon bonds with which to build sewers."

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It is said that these two subjects are each distinct and are not germane to each other. The section of the constitution invoked in the present case has frequently been before this court for construction as applied to particular acts passed by the general assembly. The uniform holding of this court has been that, if one general subject is expressed in the title, it is not necessary that all the means or instrumentalities by which the general purpose of the act is to be accomplished should appear, either in the title or in the body of the act, provided the subsidiary matters are germane to the general subject. The course of judicial decision on this subject may be illustrated by the following cases:

In *Cannon v. Mathes*, 8 Heisk., 505, the act under consideration was entitled: "An act to fix the state tax on property." Section 4 of that act increased the tax on all privileges fifty per cent. upon the existing basis. It was held that a title purporting that an act is to impose a tax on property is sufficient to support a law embracing taxes on privileges as well as on property. It was said in that case, quoting with approval the text of Cooley on Constitutional Limitations, that:

"The general purpose of these provisions is accomplished when a law has but one general subject, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable,

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but would actually render legislation impossible."

He adds:

"The generality of a title is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it."

Referring to the particular statute under consideration Judge Nicholson said:

"The general subject of the act is revenue, and each and every section has direct reference to the subject of revenue in its different phases. It cannot be said that there is the least incongruity among the provisions of the four sections. They have a natural, if not a necessary, connection with and dependence upon each other. Revenue is the general subject of the act. Its amount and its disbursement from the treasury are the special objects provided for. It is clear that the act is not obnoxious to the objection that it embraces more subjects than one."

In *State v. McMinnville*, 106 Tenn., 384, 61 S. W., 785, it was held:

"A statute whose general subject is the release of municipal corporations from liability to the State for certain taxes on litigation, that should have been, but were

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not, collected in their police courts, is not amenable to constitutional objection, as embracing more than one subject, because of its provisions that all pending actions for such taxes should be dismissed and that no new actions should be brought for same. The mandate to dismiss pending actions, and the prohibition against bringing new ones, are but parts of the same general subject."

The court said:

"A statute with one general subject may embrace subdivisions, provisos, and exceptions pertinent to that subject, and so many of them as may be grouped without incongruity."

In *Carroll v. Alsup*, 107 Tenn., 266, 64 S. W., 195, the title of the act under consideration was:

"An act to provide more just and equitable laws for the assessment and collection of revenue for State, county, and municipal purposes, and to repeal all the laws in conflict with the provisions of this act whereby revenue is collected from the assessment of real estate, property, privileges and polls."

The body of the act contained a provision for the assessment of quasi public and manufacturing corporations different from that applied to other classes of corporations, in that the shares of stock of the former classes of corporations were not to be assessed to stockholders; compensation for the difference being made in the manner of assessing the properties of the companies. This court held that the act did not embrace two separate and distinct subjects, but only the general and

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broad subject of the just and equitable assessment and collection of State, county, and municipal taxes; that this broad subject expressed in the title covers all the provisions of the act, including the manner of assessing property of corporations; and the matters complained of as exemptions are in fact only different methods of taxing the property of different corporations.

In *Condon v. Maloney*, 108 Tenn., 83, 65 S. W., 871, it was held that chapter 8, Acts of 1901, providing for a road law for Knox county, was not obnoxious to constitutional objection as embracing two subjects, although it deals in its body with public roads and the county workhouse. It was shown that by the act of 1891 (Shannon's Code, section 1642) "all persons confined in county jails or workhouses shall be available to the commissioners for the purpose of working on the public highways." Thus the two subjects of public roads and of workhouses have been connected in the history and in the legislation of Tennessee until it is fair to say that the connection has become organic, and it is entirely within the power of the legislature, in seeking to secure good roads, to place these two matters thus connected under one control.

In *State, ex rel., v. Hamby*, 114 Tenn., 363, 364, 84 S. W., 622, it was held that an act entitled "An act to create and establish four civil districts in the county of Cumberland in lieu of the thirteen civil districts now existing, to define the boundaries of the same, and to abolish certain offices in said county and to provide for

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the election of their successors," embraced but one subject. The objection to the act was that it embraced two subjects, as follows: (1) Redistricting Cumberland county; and (2) the abolition of certain offices in that county.

In *State v. Yardley*, 95 Tenn., 546, 32 S. W., 481, 34 L. R. A., 656, the act was entitled: "An act to protect hotel, inn and boarding house keepers." The body of the act provided: (1) That certain fraudulent acts to the prejudice of hotel, inn, and boarding house keepers should be misdemeanors; (2) what shall constitute *prima facie* evidence of fraudulent intent in prosecutions for these acts; and (3) for the sale of baggage and other property left by defaulting patrons of hotels, inns, and boarding houses. It was held by this court that all matters which are naturally and reasonably connected with the subject of a statute, either directly or indirectly, and all measures which will or may facilitate the accomplishment of the purposes of the statute are properly connected in it, and that the act in question did not embrace more than one subject.

In *Ryan v. Terminal Co.*, 102 Tenn., 128, 50 S. W., 748, 45 L. R. A., 303, the act under consideration was entitled: "An act to amend an act entitled 'An act to provide for the organization of railroad terminal corporations and to define the powers, duties and liabilities thereof.' " The three sections of the act empowered railroad companies which entered into contracts with

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a terminal company to guarantee the principal and interest of bonds issued by such company, as well as other contracts made by it in regard to its corporate business, and also to subscribe for, hold, and dispose of the capital stock or bonds which may be issued by the terminal corporation. It was held that the body of the act was germane to the title which embraced only one subject.

In *McElwee v. McElwee*, 97 Tenn., 649, 37 S. W., 560, the act under consideration was entitled: "An act to extend the statute of limitations to liens on realty and to quiet titles." It was objected that, while the caption related to liens on realty and to the quieting of titles, the body of the act embraced liens retained in deeds, mortgages, deeds of trust, and assignments of realty to secure debts; that the caption of the act simply proposed to bar liens in ten years, and cannot be made to include mortgages, deeds of trust, and assignments to secure debts. The court said:

"It is evident that the general scope of this act in its caption and body is to provide and fix a limitation of the life of liens on real estate, no matter how created, in order to quiet titles, and is not subject to the criticism made. This constitutional provision (article 2, section 17) has, by the court, been given liberal construction, so as not to embarrass legislation and prevent the beneficial purposes for which it was adopted."

In *State v. Lasater*, 9 Baxt., 584, the title of chapter 130, p. 216, Acts of 1875, was attacked. It was entitled "An act to define the rights, duties and liabilities of innkeepers, common carriers and proprietors of places of

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public amusement." The second section was as follows:

"That a right of action is hereby given to any keeper of any hotel, inn, theater, public house, common carrier, and restaurant, against any person guilty of turbulent or riotous conduct in or about the same, and any person found guilty of so doing may be indicted and fined not less than one hundred dollars, and the offender shall be liable to a forfeiture of five hundred dollars, and the owner or person so offended against may sue in his own name for the same."

The subject of inquiry was whether the section last quoted was upon the same subject embraced in the title. The court said:

"Here the subject is the rights, duties and liabilities of innkeepers, common carriers, proprietors of places of public amusement, etc. Now a provision that no turbulent or riotous conduct shall be allowed in such places, and providing for the punishment of the offenders, we think, is not legislation on a different subject. Looking to the evil to be remedied, and bearing in mind that there must be a clear violation of the constitution before we can declare an act void, we hold that this act is not void on this ground."

It is unnecessary to multiply the cases in which this section of the constitution has been considered, since those already cited illustrate the liberal construction which this court has uniformly given to that provision of the constitution. It is to be observed that in the cases

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already cited, and in nearly all on the the subject, decided by this court, the precise question was whether the body of the act under consideration was embraced within the title.

The exact question presented on this record is whether two distinct subjects are expressed within the title of the act of 1907. As stated by this court in *State, ex rel., v. Hamby*, 114 Tenn., 364, 84 S. W., 622:

"The constitutional provision invoked does not apply to the title, but to the body of the bill, the effective, operative part of the statute, the law that is made. It is no objection to a bill that the caption is broader than the enacting part, or covers, or can be construed to cover, other subjects, so that the real subject of legislation is therein expressed and not obscured by foreign matters."

It is conceded that in the case *sub judice* the same objection made to the title is also presented in the body of the act, providing for the issuance of municipal bonds for separate and distinct purposes. In other words, the objection is that the title is restrictive, and limits the power conferred by the act to the issuance of two classes of bonds, and that neither class is germane to the other; hence it is said two subjects are presented both in the title and in the body of the act.

A similar objection was made to the act under consideration in the case of *State v. Fickle*, 3 Lea, 79. The act was entitled:

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"An act to establish a chancery and law court at Bristol in the county of Sullivan."

The first nine sections of the body of said act related to a chancery court to be organized and held at Bristol by the chancellor of the First division, while the remaining sections provided for the establishment of a law court at Bristol as one of the courts of the First circuit. Said this court:

"The argument is that this act embraced two subjects—one, the establishment of a chancery court; the other, the establishment of a law court. . . . Shall we say that the establishment of a chancery court at Bristol is one general subject, and the establishment of a law court is another general subject, and that it is necessary, in order to maintain the integrity of the clause of the constitution in question, to hold that these two general subjects should be accomplished by separate acts? Is the establishment of these two courts at the same place two general subjects, incongruous and without connection or relation with each other? Are the provisions of the act such as to operate as a surprise upon legislators or others, or to open the way to frauds and improper influences, such as are supposed to obtain in 'omnibus' or 'job' bills? We think not. It can hardly be doubted that a bill to establish a new county might properly provide for all necessary courts. These would be mere incidents germane to the general subject. The general subject of this bill is not so broad, and we think a proper construction of this act will be to hold that the

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general subject is the establishment of such additional courts for Sullivan county as, in the opinion of the legislature the public exigencies demanded, and with the general object the act contains nothing incongruous. . . . Treating the general subject of the act as the establishment of such additional courts for Sullivan county as the public exigencies demanded, it is manifest that this general subject is expressed in the title, to wit: 'An act to establish a chancery and law court at Bristol, in Sullivan county.' This undoubtedly gives notice of what the act may be expected to contain, and it cannot fairly be said that the title is deceptive or misleading. It is argued that the title indicates but one court, a court having common-law and equity jurisdiction, whereas the act provides for two courts, one of chancery and the other of law jurisdiction. This may be the strictly grammatical construction of the language of the title; but the point, though ingeniously pressed, is too fine for practical application.

"The generality of the title is no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection. *Cannon v. Mathes*, 8 Heisk., 519."

Another case in which it was claimed the title was restrictive, and objection made both to the title and the body of the act, is the case of *State v. Brown*, 103 Tenn., 454, 53 S. W., 727. Chapter 129, p. 273, Acts of 1893, is entitled:

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"An act to amend section 5365 of the Milliken & Vertrees' Compilation of the Laws of Tennessee, being section 4614 of the Code, as amended by chapter 56, Acts of 1871, so as to raise the age of consent, as set forth in said section to twelve years, and to prescribe punishment in the penitentiary against persons having carnal knowledge of females over twelve years and under sixteen years and one day of age."

The body of the act provided that:

"Any person who shall unlawfully and carnally know and abuse a female under the age of twelve, shall, on conviction, be punished as in the case of rape; and any person who shall unlawfully know a female over the age of twelve years and under the age of sixteen years and one day, shall be deemed guilty of a felony in all cases not falling under the statutes relating to rape, and on conviction, shall be confined in the penitentiary for not less than three years, nor more than ten years," etc.

This court, in passing upon the constitutionality of this act, said:

"The insistence is that this provision is doubly violated, in that both the title and body of this act embrace two subjects. The title or caption does express the purpose to raise the age of consent from ten to twelve years, and also the purpose to prescribe the punishment for the carnal knowledge of females over twelve years and under sixteen years and one day of age, and these two purposes are more fully expressed and put in force by the more elaborate language of section 1 of this act.

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Yet this does not establish the proposition that the caption and body of the act express and treat respectively two subjects. In reality the subject is single, and the two purposes indicated relate to different parts of that one subject, which is the prevention and punishment of carnal connection with young females."

It will be observed that in all of these cases the inquiry of the court was to ascertain from the title the general subject of the act, and it was held that matters which might fairly relate to that subject might properly be embraced in the body of the act.

The title of chapter 361, p. 1203, of the Acts of 1907, is as follows:

"An act to authorize municipalities of Tennessee having a population of the census of 1900, or any subsequent federal census, of not less than thirty thousand nor more than forty thousand, to issue one hundred and sixty-five thousand dollars of coupon bonds with which to fund the floating debts of said cities, to increase and improve the fire departments, to widen streets, and pay damages to property holders caused by the erection of viaducts and bridges; also to authorize said cities to issue fifteen thousand dollars of coupon bonds with which to build sewers."

It will be observed, from an examination of the body of the act already quoted, that the purposes disclosed in the title are fully embraced in the enactment. What, then, is the general subject embraced in the title of this

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act? It requires neither a narrow nor a latitudinarian construction to hold that the issuance of bonds for municipal purposes is the subject of the caption. An issue of \$165,000 of coupon bonds is authorized for certain municipal purposes therein designated, while another issue of \$15,000 is allowed for another municipal purpose. Funding floating municipal debts, increasing and improving the fire department, widening streets, and the payment of damages to property holders caused by the erection of viaducts and bridges, and also the building of sewers, are all undeniably municipal purposes. If this act, instead of dividing the amount of the bond issue, had authorized the issuance of \$180,000 of coupon bonds, enumerating the purposes for which they might be used, the present verbal criticism would be eliminated. The fact that the amount of the bond issue is divided, \$165,000 of coupon bonds to be used for the purposes enumerated in the title and \$15,000 for the other purpose designated, would not convert the general subject of the act, to wit, the issuance of bonds for municipal purposes, into two subjects, for the reason that all the purposes expressed in the act are cognate and germane to that one general subject.

It is conceded by counsel for the defendant that, if the title had conferred on the municipalities embraced in the act the general power to issue bonds for municipal purposes, it would have been competent to include in the body of said act bonds to fund floating debts and bonds to build sewers. We do not think the case

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supposed stronger than the actual title of the act herein, wherein the bond issue is divided into two classes apportioned for designated municipal purposes. Whether the title to the present act be considered from the viewpoint of a general or restrictive title, the subjects embraced in the title and in the body of the act are all municipal purposes, and in that way related to each other. In our opinion the act in question is a constitutional enactment, and the result is the judgment will be affirmed.

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CHARLES A. ATKINS v. STATE.*

(Knoxville. September Term, 1907.)

1. **EVIDENCE.** Nonexpert witnesses of personal observation may give opinion as to sanity or insanity, when.

Where a nonexpert witness shows that he has had the means of observing the capacity, manner, peculiarities, or deportment of the person concerning whose sanity he undertakes to give evidence, he shows that he possesses the fundamental qualification of previous personal observation that renders him competent to give his opinion as to the soundness or unsoundness of the mind of such person. Such opinion or judgment approaches to knowledge, and is knowledge, so far as the imperfections of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury. (*Post*, pp. 463-472.)

Cases cited and approved: Gibson v. Gibson, 9 Yerg., 332; Norton v. Moore, 3 Head, 482; Puryear v. Reese, 6 Cold., 26; Dove v. State, 3 Helsk., 365; Wisener v. Maupin, 2 Bax., 357; Kirkpatrick v. Kirkpatrick, 1 Tenn. Cas., 258; Wilcox v. State, 94 Tenn., 110.

2. **SAME.** Same. Nonexpert witness must state the facts of knowledge of, and acquaintance with, the person whose sanity is under inquiry.

A nonexpert witness cannot give an opinion as to the soundness or unsoundness of the mind of a person concerning whose sanity he undertakes to testify, unless he gives the facts of his knowledge of, and acquaintance with, such person. (*Post*, pp. 467-471.)

Case cited and approved: Wisener v. Maupin, 2 Bax., 257.

*As to what intoxication will excuse crime, see note to Harris v. United States (App. D. C.), 36 L. R. A., 465.

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3. **SAME.** Nonexpert witnesses to state the facts before giving opinion as to sanity or insanity; failure not reversible error, when.

The proper practice in the examination of a nonexpert witness as to the sanity or insanity of the accused or other person, whose sanity is under inquiry, is to require the witness to state first the facts on which he bases his opinion, though a failure to comply with this rule would not be reversible error, where the facts are stated in the course of the testimony. (*Post*, pp. 470, 471.)

4. **SAME.** Nonexpert witnesses showing acquaintance sufficient to render them competent to give opinion as to sanity or insanity.

Nonexpert witnesses who show that they had known the accused for some time, and had frequently seen and talked with him, are competent to give their opinion as to his sanity or insanity. (*Post*, pp. 463-472.)

5. **CHARGE OF COURT.** Cautioning jury against expert testimony that is not erroneous.

A charge of the court stating that while expert testimony is sometimes the only or best means to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent investigation to reach the truth; and instructing the jury to receive it with caution, but to give to it such weight as they give all the other testimony, having in view a purpose to arrive at the truth, giving an impartial estimate of all the evidence, does not discriminate against the expert testimony, and is not erroneous. (*Post*, pp. 472, 473.)

Case cited and approved: *Wilcox v. State*, 94 Tenn., 106.

6. **HOMICIDE.** Voluntary intoxication as a defense to murder in the first degree, but not to the lower degrees, when.

Voluntary drunkenness or intoxication is available as a defense only in determining whether the accused is guilty of murder

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in the first degree or in the second degree, depending upon the fact whether the intoxication prevented the deliberation and premeditation essential to constitute murder in the first degree; but as to all subsequent inquiries, including self-defense, he must be judged by the same rules which measure the conduct of sober men, and he cannot escape conviction on the ground of intoxication causing him to think erroneously that the deceased intended to do him great bodily harm, and that he killed the deceased in self-defense, when a sober man would not have so thought and acted. (*Post*, pp. 472-490.)

Cases cited and approved: *Bennett v. State*, M. & Y., 133; *Cornwell v. State*, M. & Y., 147; *Swan v. State*, 4 *Humph.*, 136; *Pirtle v. State*, 9 *Humph.*, 663; *Halle v. State*, 11 *Humph.*, 154; *Norfleet v. State*, 4 *Sneed*, 346; *Lancaster v. State*, 2 *Lea*, 575; *Cartwright v. State*, 8 *Lea*, 376, 385; *Reniger v. Fogossa*, *Plowden*, 19.

7. **CHARGE OF COURT.** That drunkenness aggravates the offense is a harmless error, where the jury fixed minimum punishment, when.

The court's erroneous charge to the jury that the drunkenness of the accused would not only be no excuse for his commission of the homicide, "but rather an aggravation of his offense," was not prejudicial, but harmless, where the jury found the accused guilty of murder in the second degree, and assessed his punishment at the minimum. (*Post*, pp. 475, 490, 491.)

8. **SAME.** Request for instructions covered by those given are properly refused.

A request to charge what is fully covered by the charge given is properly refused. (*Post*, pp. 477, 491.)

FROM KNOX.

Appeal in error from the Criminal Court of Knox County.—D. D. ANDERSON, Judge.

Atkins v. State.

W. L. WELCKER, JOHN C. HOUK, WILL D. WRIGHT, N. N. OSBORNE, and A. Y. BURROWS, for Atkins.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

MR. JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted in the criminal court of Knox county at the January term, 1906, for the murder of one Edith Eckel, and was convicted and sentenced to ten years' confinement in the State penitentiary. From this judgment, after his motion for a new trial was overruled, he appealed to this court, and has here assigned errors.

The errors assigned are wholly upon the action of the court in admitting certain testimony objected to in the court below, and upon certain portions of the charge. In order, however, to a proper understanding of the points thus arising, it will be necessary to give a brief statement of the facts and of the defenses interposed.

On the night of November 1, 1905, shortly before 11 o'clock, the plaintiff in error called at the house of the deceased, and while there began dancing noisily in the hall, into which the parlor opened. In the parlor there were two other women sitting by the fire, and the deceased was sitting on a sofa in the corner of the room talking to one Charles Stephens. The deceased, having her attention attracted to the noise which the plaintiff in error was making in the hall, called out to him to de-

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sist, or, to use her expression, "to cut out that dancing." Plaintiff in error replied, "I will cut it out in the hall and bring it in there." Thereupon he entered the parlor and began dancing in front of the fire. Then the deceased got up from her seat, and advanced near to the plaintiff in error, and started to put her hand on his shoulder. He thereupon fired into her breast with a derringer pistol and killed her. She had nothing in her hands at the time, except a bunch of keys and a silver dollar. Plaintiff was very drunk at the time, but immediately after shooting the deceased he left the house, shutting the front door after him. He soon afterwards appeared at the Cumberland Hotel, and left his pistol with the clerk to keep for him, telling him that he had shot a woman.

There was evidence introduced on the trial to the effect that the plaintiff in error had certain physical defects which indicated that he was a degenerate, also that his father was a hard drinker before the plaintiff in error's birth, and afterwards for a series of years; that plaintiff in error, for some ten or twelve years immediately preceding the homicide, had been addicted to strong drink, including whisky, brandy, absinthe, and every other kind of drink sold in saloons; that he had many times suffered from delirium tremens, and for two years had been affected with a chronic disease which deeply impaired his nervous system; that on the night in question he was suffering from a recent surgical operation which gave him great pain. There was also evi-

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dence that he suffered greatly from the loss of sleep, and from insufficient nourishment, caused by his dissipated habits. On the basis of these facts, hypothetical questions were submitted to several physicians at Knoxville touching his sanity. These physicians all testified, on the hypothesis stated on the questions propounded to them, that the man was irresponsible at the time the act was committed. On the other hand, the State introduced testimony to the effect that the plaintiff in error was a civil engineer, and was in the employ of the Southern Railway Company as such, a few weeks before the homicide, and that he had a responsible position, having two men under his direction. There was also evidence to the effect that whatever may have been his state of degeneracy, or whatever may have been the degree of deterioration which he had reached as the result of the vicious life he had led, he knew right from wrong when he was not drinking, and that it was the effect of intoxicating liquors acting upon his enfeebled organization that brought him to an unreasoning state, when he was under the influence of these potations. The state also introduced two nonexpert witnesses to testify as to their opinion of the plaintiff in error's sanity, from personal acquaintance and long observation of him. The introduction of these witnesses is the first ground of objection by the plaintiff in error.

The first of these witnesses was A. A. Goolsbee. This witness testified that in the month of November, 1905, he was a deputy sheriff of Knox county, and prior to

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that time he had been assistant chief of police; that at and before the homicide he had long known the plaintiff in error, and was accustomed to seeing him every day or so, and would sometimes have a talk with him; that he had known him for fifteen years. After he had stated these facts he was asked: "From your observation, and from your talks with him, state whether or not, on November 1, 1905, he was a sane man or an insane man." This was objected to, on the ground that the witness was not an expert, and could not express any opinion until he had given facts on which to base it. The objection was overruled. The question was then repeated in the following form: "State whether or not, from your observation of Charles Atkins, over the time you have mentioned, your talks with him, and your acquaintance with him, up to November 1, 1905, Charles Atkins was a sane man or an insane man." The same objection was made and overruled. The witness then answered: "Well, it is a question. I have seen Charley under the influence of liquor, or under the influence of an opiate of some kind, I don't know which. I have seen him when he was acting under the influence of an opiate, when I didn't smell whisky on him, and outside of that time I never seen anything wrong with him—always supposed him to be a boy of good sense." At this point counsel for plaintiff in error asked that the evidence be excluded, because it consisted of a mere opinion of the witness, and was not based on facts first de-

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tailed to the jury. The objection was overruled. The examination then proceeded as follows:

"Q. State whether or not, in your opinion, at this time, he was sane or insane. A. At what time? Q. That is, in November, 1905. A. Why, I considered him sane. (Counsel for plaintiff in error: We object to that, because he is not qualified as an expert, nor instanced his manner, conduct, and conversation before giving his opinion as a nonexpert. No ruling.) Q. Did you not talk to him prior to this time? A. Well, I lived by him three or four years down here. Q. Would you, or not, meet him on the streets here in the city? A. Yes, sir; the same as I would other men. Q. Well, what would you see him doing? A. I would see him coming from work, and sitting on the porch, reading the papers, just as any ordinary man would do. Q. Do you remember any conversation you had with him at any time? A. Nothing in particular, no more than I would any other man that I pass and repass. Q. Did you, or not, see him after he was in jail, charged with this killing? A. I don't think I saw him in jail. I saw him after he was out. Q. From your talks with him, and your observations of him, what you saw him doing as you have stated, state whether, in your judgment, he was a sane or insane man. (Counsel for prisoner: We object to the question, because he has not in any manner qualified himself to answer same. Ob-

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jection overruled.) A. I consider him sane when he wasn't drunk."

The next witness on the subject whose testimony was objected to was Harmon Kreis, the sheriff of the county. This witness testified that he first became acquainted with the plaintiff in error when he was brought to the jail for confinement just after the homicide; that he saw him every day during the time he was incarcerated, running over a period of two or three months—in fact, about three months; that he had conversations with him, and had an opportunity of observing him; that plaintiff in error read a good deal; that he was sick, and that he allowed him to eat at his (the sheriff's) table, for two or three weeks; that while at table he would talk with the plaintiff in error, but never about his case; that he talked with him upon general subjects. After having made these statements, the witness was asked the following questions: "Q. Now, sheriff, state whether or not, after having observed his actions in jail, during the period you have mentioned, and having had the talks with him you have mentioned, whether or not, in your judgment, at that time, he was a sane or an insane man. (Counsel for the prisoner: We object to the question as incompetent. He has detailed no conduct, conversation, etc., upon which to give an opinion. Objection overruled.) A. Well, I wouldn't take him for an insane man. He did not act like one to me, though I am not an expert." On cross-examination the witness testified that he saw the plaintiff in error the next morning after the homicide, and perhaps had some

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conversation with him, but does not remember anything that was said. He was then asked if he could repeat any conversation he had ever had with the plaintiff in error after he was placed in jail, and he answered that he could not.

Upon the question suggested, by the exceptions above noted, there is a great array of authority. We shall, however, refer to only two text-writers, and to our own cases.

In Elliott on Evidence, vol. 1, section 681, it is said: "There are a few decisions to the effect that an ordinary witness cannot give an opinion as to the sanity or insanity of a person; but the overwhelming weight of authority is to the effect that he may testify to the sanity or insanity of another in a proper case. His opinion or conclusion, however, must be based upon personal observation or knowledge, and not upon hypothetical facts, nor on what he has heard from others. It is also generally held that he must first state the facts upon which his opinion or conclusion is based. But in the case of subscribing witnesses to a will, who testify to the sanity of the testator, it seems that they may give their opinions without first stating the particular facts on which they are based."

In Wigmore on Evidence, vol. 3, section 1917, et seq., there is an extensive discussion of the subject. At section 1933 this author says: "At common law, in England, there never had been any question that the opinions of lay witnesses as to sanity or insanity could be

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received. Wherever a person presented himself as having had acquaintance with, and therefore observation of, a testator, or an accused person, whose sanity was in question—i. e., wherever the witness had the fundamental testimonial qualification of personal observation—no one thought of objecting on the score of the opinion rule. This plainly appears in the long list of trials in which such testimony was received. Moreover, when the opinion rule began to be discussed and formulated in the last part of the 1700's and the early part of the 1800's the judges and the treatise writers constantly named this subject as one upon which lay opinions were always and unquestionably received."

In section 1938 of the same work, at the close of the discussion, the author says: "As to the state of the law in the various jurisdictions, it is enough to note in general that laymen's opinions are to-day everywhere said to be admissible, subject to local qualifications and quibbles." Upon this follows an exhaustive note citing the cases, with their holdings from all of the states.

In our state we have several cases upon the subject: *Gibson v. Gibson*, 9 Yerg., 332; *Norton v. Moore*, 3 Head, 482; *Purveyar v. Reese*, 6 Cold., 26; *Dove v. State*, 3 Heisk., 365; *Wisener v. Maupin*, 2 Baxt., 357; *Kirkpatrick v. Kirkpatrick*, 1 Tenn. Cas., 258; *Wilcox v. State*, 94 Tenn., 110, 28 S. W., 312; and perhaps other cases. The fullest statement of the doctrine, as now held in this state, appears in *Wisener v. Maupin*. In that case the question was as to the sanity of a testa-

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tor. "After a witness," says the court, "had given the facts of his knowledge of and acquaintance with the testator, he was asked: 'From these facts, state in your opinion whether or not he was of sound mind and disposing memory.' The answer is: 'He was not of sound mind and disposing memory.' The court allowed the answer, so far as the statement that he was not of sound mind, but refused to allow it, and sustained the exception, as to the question of disposing memory." In holding this action of the court below correct, this court, speaking through Mr. Justice Freeman, said:

"The question presented in the case of *Gibson v. Gibson* was also discussed in the case of *Norton v. Moore*, 3 Head, 482. And the principle settled by the two cases is that, when the witness has had the means of observing the testator's capacity, manner, peculiarities, or deportment, he may give his opinion as to the soundness or unsoundness of his mind. 'Such judgment,' says Judge Wright, in the case quoted, 'approaches to knowledge, and is knowledge, so far as the imperfections of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not had the opportunity of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observation of others.' This decision, as well as the case of *Gibson v. Gibson*, 9 Yerg., 332, is based on an approval of the case of *Clary's Adm'rs v. Clary*, 24 N. C., 78. In that case, as stated

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in Judge Wright's opinion (3 Head, 482), the witness had no acquaintance with the donor, except from one occurrence. Eleven years before the execution of the deed in dispute he had visited her for the purpose of writing her will, had received her directions on the subject, and wrote it. The witness said at this time she appeared to him to be in good health, but he thought her intellect in the state usually termed childish. The objection to this testimony was that it gave the opinion of the witness upon the state of the donor's mind. This was held competent by the supreme court of North Carolina, and, as we have said, this case has been followed by this court in the two cases cited; and we have no question of the soundness of the principle. As a matter of course, the jury should weigh the testimony in connection with the means of observation of the witness, and his intelligence, qualifying him to form a judgment; but the evidence would clearly be competent. Under these rules we can see no error in the action of his honor."

Nowhere is it held that the mere opinion of the non-expert witness, without opportunity for observation, is competent, and everywhere stress is laid upon the facts coming under the observations of the witness, in order to determine the weight of his testimony; and it has been held in this State (*Jones v. Galbraith*, 59 S. W., 350, 355) that in chancery cases, where the evidence is in the form of depositions, it is not essential that the witness, prior to the expression of his opinion, should state the facts on which he bases that opinion, but

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that it is sufficient if these facts appear in the course of the desposition. In trials at law, where the testimony is given *ore tenus*, our cases recognize the proper practice as requiring first a statement of the facts by the witness and then the statement of his opinion. However, a failure to comply with this rule would not be reversible error, if the facts should be stated in the course of the testimony of the witness, since it is by these that the court and jury must judge of the weight and value of the opinion of the witness. It is indisputable that it should appear somewhere in the testimony of the witness that he had the testimonial qualification of previous observation of the person concerning whose sanity he undertakes to give evidence. It must appear, as a preliminary to the expression of his opinion, that he has had the means of observation. He must give the facts of his knowledge and acquaintanceship with the person concerning whose sanity he is called to testify. After having given these facts he may express his opinion. The weight of the opinion, or its value, is then developed further by evidence of the particular facts coming under his observation, and on which he bases his opinion.

On the principle stated in *Wisener v. Maupin*, we think the testimony of both Goolsbee and Kreis was competent. They stated the facts of their acquaintanceship and observation of the prisoner, and thus showed that they had the means of knowledge. The value or weight of their evidence depended upon the importance

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of the particulars stated by them, and this was for the jury.

It is next assigned for error that the circuit judge charged the jury as follows:

"Expert and nonexpert witnesses have been allowed to testify to you as to the truth or falsity of the plea of defendant of unsound mind. This plea need not be specially written and pleaded, as the same can be set up under the general issue not guilty. In reference to the expert testimony offered you in this case, and which you should weigh and consider along with the other proof in the case, I charge you in regard to it that expert testimony should be received with caution. While expert testimony is sometimes the only means of, or the best way to, reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent investigation to reach the truth. You should give just such weight as you do all the other testimony in the case, governed by a rule to arrive at the truth, giving fair and impartial estimation of all the evidence adduced in the case."

There is no error in the charge just quoted. It is substantially what was said by this court in the case of *Wilcox v. State*, 94 Tenn., 106, 112, 28 S. W., 312.

It is said that this portion of the charge singles out expert evidence and discriminates against it, practically telling the jury that it is without value. We do not think this an accurate criticism. The judge merely cautions the jury against the infirmities attaching to this

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particular species of evidence, and he adds in the last sentence that the jury must give to it such weight as they do to all the other testimony, having in view a purpose to arrive at the truth, and being careful, at the same time, to give to this evidence a fair and impartial estimate or value, as they must do to all the evidence adduced.

The remaining assignments of error relate to other parts of the charge of the court, and to the refusal of his honor to give certain instructions to the jury, asked by the plaintiff in error, the defendant below. In order that the portions of the charge objected to may be properly understood in their relation to the context, we set out below a considerable part of the charge, noting by italics those portions which are objected to. The italics, of course, do not appear in the original charge. His honor instructed the jury as follows:

"If defendant went to the house of deceased, and willfully, maliciously, deliberately, premeditatedly, and with malice aforethought shot and killed deceased, when he was neither in danger from her of his life, or of great bodily harm, nor in fear of same, nor believed himself so, and upon reasonable grounds, then and in that event defendant, by the killing of deceased in manner and form aforesaid, committed murder in the first degree; but if defendant went to the house of deceased drunk, and to such a degree that his intoxication incapacitated him from forming a deliberate and premeditated design to kill, then defendant would not be guilty of murder in

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the first degree, and his crime would be murder in the second degree.

“Voluntary drunkenness presents no excuse to you, gentlemen of the jury, for the act of homicide. It does not mitigate it. But you are not trying defendant for drunkenness, and you need only to consider it as tending to shed and throw light on his mental *status* and condition of mind at the time, in determining for yourselves, together with all the facts and circumstances, the degree of homicide, if any, defendant has committed. If, after you have fully considered all the facts, the condition of defendant's mind caused by intoxication, and whether in an excessive state of intoxication, or any degree of intoxication, it is legitimate for you to inquire whether it affected, and to what extent it influenced, the defendant in the commission of this act, and, viewed with all other facts and circumstances of the case that have been admitted and testified to in this trial, it is a proper subject for consideration; and I instruct you that, although drunkenness in point of law constitutes no excuse or justification for crime, still, when the nature and essence of a crime depends by law upon the peculiar state and condition of the defendant's mind at the time of the killing, it must claim your careful consideration. But, on the other hand, the court again will charge that in legal estimation a drunken man may be guilty as if he were sober, if it shall appear from the killing the same was willful, deliberate, malicious, and premeditated; but, if the defendant was drunk at the

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time he is alleged to have committed the offense, then you say how far that drunkenness precluded the defendant, his intoxication operating on his mind, from contemplating murder in the first degree as defined herein. If it does (not), he may be guilty of murder in the second degree. *It is not claimed by the defendant, through his counsel, that the killing was committed in defense of his (defendant's) life, so that it is needless to instruct you in reference thereto further than I have already; but counsel for the defense do say and allege that at the time of the commission of the offense defendant's mind was so beclouded by liquor that by reason thereof he labored under a delusion that deceased was about to attack him (defendant) with a knife, and hence he fired the fatal shot, and I instruct you thereon that, if the delusion was the outcropping of a mind permanently diseased and unsound, then defendant would not be guilty; but if, on the other hand, that delusion was born of strong drink and intoxication at the time, then it would avail the defendant nothing, and be no excuse for the killing, but rather an aggravation of his offense. How this is you must say from the proof. . . .*

"As between the two offenses of murder in the first degree and second degree and voluntary manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, and if the killing was voluntary, and committed under the influence of liquor either to a great or less degree, but so as to becloud and render oblivious the slayer's mind, and so as to preclude delib-

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eration, premeditation, or murder in the first degree, necessarily it would be murder in the second degree; and if there was a provocation that was sufficient and adequate, and made by the deceased, such as a blow, it might be manslaughter. Manslaughter is defined as the unlawful killing of another without malice, express or implied. Now, if you should believe that the defendant, at the time of the slaying of deceased, was of unsound mind, incapable of knowing the right and incapable of knowing the wrong, and an irresponsible person, then you should acquit the defendant. But, if his irresponsibility grew out of and was traceable to strong drink and intoxication at the time, then and in that event his plea of insanity will not avail him. If he knew right from wrong prior to and just before the killing, but reason was dethroned by liquor at the time of the slaying, and this proof leads you to attribute his incapacity to judge of the right and understand wrong of his deeds by reason of intoxication only, the defendant could not avail himself of his plea of insanity."

The instructions which the plaintiff in error asked the court below to charge, and which were not given, are the following:

"(1) If you believe, from the proof, that defendant, Atkins, from any cause, at the time of firing the shot causing the death of Edith Eckel, was irrational, and did not at that time know that he was doing wrong in shooting, then the defendant, Atkins, would be guilty of no

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crime, and your verdict should be not guilty in this case.

"(2) If you have a reasonable doubt, arising from the proof in the cause, whether defendant had sufficient understanding to know the nature of the act he was performing when he shot Edith Eckel, and was not able to know and understand whether he was doing right or wrong, then you should render a verdict of not guilty in this case."

"(6) If the jury shall believe that the defendant honestly believed that, when Edith Eckel approached him, she had drawn a knife or other weapon and was about to endanger his life or do him great bodily harm, that he was then in imminent danger, then he would be guilty of no crime or any degree of homicide heretofore described, but would be acting in self-defense, and your verdict would be not guilty."

Before considering the objection made upon the portions of the charge above referred to, and upon the refusal to charge the three requests, it is proper to say that the court below instructed the jury correctly upon the subject of the presumption of innocence. He charged upon the subject of reasonable doubt as follows:

"There is another test that inures to the safety of all defendants that you must regard, and it is this: That the State must make out its case beyond a reasonable doubt, and this doubt obtains as to every fact and circumstance of the case, and if upon the whole case you have a reasonable doubt it should be given to the de-

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fendant, and he be declared by your verdict not guilty.”

Again he said: “A reasonable doubt is a doubt springing up of itself and out of the evidence, and if upon the whole case you have such doubt you should acquit; and if you have reasonable doubt as to the irresponsibility of defendant you should acquit defendant, and if at the time of the killing, or now, defendant is a person of unsound mind, incapable of knowing right from wrong, your verdict should be not guilty.”

He afterwards added the following: “If you have a reasonable doubt regarding the existence of any fact essential to make out the offense charged in this case, then you must find every such fact about which you entertain such doubt in favor of the defendant, and exclude the same from further consideration, and if any crime charged in the indictment, or all of them, cannot be made out, unless such fact shall be adopted as proven, then of any and all offenses thus affected the defendant must be found not guilty.”

The substance of the contention of plaintiff in error's counsel in respect of the portions of the charge and the undelivered instructions above set out is that if the plaintiff in error, at the time he committed the homicide, was so intoxicated as the result of the use of ardent spirits that he did not know what he was doing, or if, owing to the intoxication, he mistook the silver dollar and bunch of keys in Edith Eckel's hand for a knife, and supposed, in his then besotted condition, that she was about to stab him with a knife, he would be guilty

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of no crime, first, because while in such a mental condition he could not entertain a criminal purpose, and, secondly, because he would be in the proper exercise of the right of self-defense.

The law upon this subject, as we regard it, has long been settled in this State, and but for the very earnest and insistent presentation of the views above suggested by the eminent counsel for the prisoner we should not deem it necessary to do more than merely cite the cases. However, under the circumstances, we shall go into the matter sufficiently to recall the language of some of the cases and to state the general principle as held in this State.

We have several cases upon this subject. They are: *Bennett v. State*, Mart. & Y., 133; *Cornwell v. State*, Mart. & Y., 147; *Sivan v. State*, 4 Humph., 136; *Pirtle v. State*, 9 Humph., 663; *Haile v. State*, 11 Humph., 154; *Norfleet v. State*, 4 Sneed., 346; *Lancaster v. State*, 2 Lea, 575, *Cartwright v. State*, 8 Lea, 376, 385.

In the case last cited, after reviewing the greater number of the previous cases, the court said: "The rule to be extracted from these cases is about this: If drunkenness exists to such an extent as to render the defendant incapable of forming a premeditated and deliberate design to kill, then, of course, he cannot be guilty of murder in the first degree. Still, if the drunkenness be not of this extent, nevertheless the jury may consider the drunkenness in connection with all the facts, to see whether the purpose to kill was formed in passion pro-

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duced by a cause operating upon a mind excited with liquor, not such adequate provocation as would reduce the killing to manslaughter, but nevertheless such as produced passion in fact, and reduce the killing to murder in the second degree, or whether, notwithstanding the drunkenness, the purpose to kill was formed with deliberation and premeditation, for a drunken man may be guilty of murder in the first degree if the drunkenness be not to such an extent as to render his mind incapable of deliberation and premeditation."

It is seen from this rule that the only consideration given to the fact of drunkenness or intoxication at the time of the commission of the crime of murder is to enable the court and jury to determine whether the prisoner may not be guilty of murder in the second degree, rather than of murder in the first degree.

The matter was stated more at large in *Haile v. State*. After referring to *Pirtle v. State*, the court, speaking through Mr. Justice Green said:

"Here the court explicitly lays down the rule to be that, in all cases where the question is between murder in the first and murder in the second degree, the fact of drunkenness may be proved, to shed light upon the mental *status* of the offender, and thereby to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation; and the degree of drunkenness which may then shed light on the mental state of the offender is not alone that excessive state of intoxication

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which deprives a party of the capacity to frame in his mind a design deliberately and premeditatedly to do an act, for the court says that in the state of drunkenness referred to a party well may be guilty of killing willfully, deliberately, maliciously and premeditatedly, and if he so kill he is guilty as though he were sober.

"The principle laid down by the court is that, when the question is, can drunkenness be taken into consideration in determining whether a party be guilty of murder in the second degree? the answer must be, that it cannot; but, when the question is, what was the mental state of the perpetrator at the time the act was done? was it one of deliberation and premeditation? then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done.

"The law often implies malice from the manner in which the killing was done or the weapon with which the blow was stricken. In such case it is murder, though the perpetrator was drunk. And no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness be caused. The law in such cases does not seek to ascertain the actual state of the perpetrator's mind, for, the fact from which malice is implied having been proved, the law presumes its existence, and proof in opposition to this presumption

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is irrelevant and inadmissible. Hence a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him.

"But, when the question is whether a party is guilty of murder in the first degree, it becomes indispensable that the jury should form an opinion as to the actual state of mind with which this act was done. All murder in the first degree (except that committed by poison and by lying in wait) must be perpetrated willfully, deliberately, maliciously, and premeditatedly. The jury must ascertain, as a matter of fact, that the accused was in this state of mind when the act was done. Now, according to the cases of *Swan v. State* and *Pirtle v. State*, any fact that will shed light upon this subject may be looked to by them, and may constitute legitimate proof for their consideration. And, among other facts, any state of drunkenness, being proved, is a legitimate subject of inquiry, as to what influence such intoxication might have had upon the mind of the offender in the perpetration of the deed.

"We know that an intoxicated man will often, upon a slight provocation, have his passions excited and rashly perpetrate a criminal act. Now, it is unphilosophical for us to assume that such a man would, in the given case, be chargeable with the same degree of deliberation and premeditation that we would ascribe to a sober man, perpetrating the same act upon a like provocation.

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"It is in this view of the question that this court held, in *Swan's Case* and *Pirtle's Case*, that the drunkenness of a party might be looked to by the jury, with the other facts in the case, to enable them to decide whether the killing was done deliberately and premeditatedly."

In a very early case (*Cornucell v. State*, *supra*) the question was examined by Mr. Justice Crabbe in a very elaborate opinion. In that case the immediate subject of the court's observations was the following excerpt from the bill of exceptions showing the action of the court below:

"The court, in charging the jury, after defining the crime of murder, stated that, the fact of killing being proved, the law presumes malice; and it lies on the defendant to show, from proof, circumstances of excuse or alleviation, unless they otherwise appear. Malice is expressed or implied; and, when there is no previous grudge, it is implied when one kills another with a deadly weapon, not having been previously assaulted, in which case it is murder. You will inquire whether there was express malice, or whether there was a previous assault. If, at the time, he had not sufficient understanding to know right from wrong, and was in a state of insanity, it would be an excuse; but that must be proved. But if his insanity or unusual bad conduct arose from drunkenness, it is no excuse. There may be cases where insanity is produced by long-continued habits of intoxication; but it must be a permanent insanity. Insanity which is the immediate effect of intoxication

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is no excuse. He is equally responsible for all his acts. The counsel for the prisoner requested the court to charge the jury, if they believed, from all the circumstances of the case, that the defendant at the time of the slaying labored under a temporary suspension of reason, and was insane, although intoxication might have been the exciting cause, it is a circumstance of mitigation or excuse; and more especially if intoxication was not intended at the time of drinking, but the same was accidental, or a consequence not intended or apprehended. But the court would not so charge, but said insanity thus produced was no excuse."

In responding to an assignment that the court below erred in charging as he did, and refusing to charge as requested, Mr. Justice Crabbe said:

"Three cases of conviction for murder have been brought before this court at the present term, in two of which the prisoner was defended in the court below on the ground of madness occasioned by drunkenness; and yet in neither does it seem to us was there a colorable foundation for such a defense. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these causes very untenable positions have been assumed, and very dangerous doctrines have been advanced by counsel; and from what was stated by some of those counsel, these doctrines have been repeatedly urged and sometimes sanctioned in the courts below.

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"It has become fashionable of late to discourse and philosophize much on mental sanity and insanity. New theories have been broached, and various grades and species of mania have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs. Whatever differences of opinion there may be as to the construction and operations of the mind of man, whatever difficulty in discovering the various degrees of unsoundness, it is only necessary for us to ascertain the kind of prostration of intellect which is requisite to free a man from punishment for crime by the law of the land. It is with this alone we have to do. 'What the law has said, we say. In all things else we are silent.' We put our feet in the tracks of our forefathers. 'Non meus hic sermo, sed quae praecepit Offellus.' Let us, then, for a moment resort to the sages of the law of different ages, and learn from them whether that species of frenzy which is produced by inebriety constitutes any excuse for crime and what sort of insanity it is which will serve this purpose.

"The good and the great, the humane yet firm, Sir Matthew Hale, in his History of the Pleas of the Crown, divides madness (dementia) into three kinds—idiocy, accidental or adventitious madness, and drunkenness. 'The second species, when it amounts to a total alienation of the mind, or perfect madness, excuses from the guilt of felony and treason; and further, persons afflicted with accidental madness, whether temporary (as in the case of lunacy) or continued, if they are totally

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deprived of the use of reason, cannot be guilty ordinarily of capital offenses; for they have not the use of understanding, and act not as reasonable creatures, but their actions are, in effect, in the condition of brutes.'

"The third sort of madness is that which is dementia affectata, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary, frenzy; but by the laws of England such a person shall have no privilege by this voluntarily contracted madness, but shall have the same judgment as if he were in his right senses.'

"In the case of *Reniger v. Fogossa*, in Plowden, 19, we have a rule laid down, which has been approved again and again, from the early day in which it was advanced to the present time, 'that, if a person that is drunk kills another, this shall be felony, and he shall be hanged for it; and yet he did it through ignorance, for when he was drunk he had no understanding or memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.' Here we have the strongest case put—a case of a total deprivation of understanding by drunkenness. Yet it is held to form no excuse.

"Lord Coke, in his Commentaries (page 247a), says: 'As for a drunkard, who is voluntarius dæmon, he hath no privilege thereby; but what hurt or ill' soever he doth, his drunkenness doth aggravate it.' And we are told in *Beverly's Case*, 4 Rep., 125, 'that although he

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who is drunk is for the time non compos mentis, yet his drunkenness doth not extenuate his act or offense, nor turn to his avail.'

"Hawkins, in his Pleas of the Crown (book 1, c. 1, section 6), says 'that he who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if he had been sober.' The erudite commentator on the laws of England writes as follows on this subject (4 Black., chs. 25, 26): 'As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as aggravation of the offense rather than as an excuse for any criminal misbehavior. The law, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another.'

"But the part of the judge's charge which is most earnestly objected to is in the following words: 'There may be cases where insanity is produced by long-continued habits of intoxication, but it must be a permanent insanity.'

"It has been already stated by us that madness, or insanity, if the term be preferred, occasioned immediately by drunkenness, does not excuse. Yet the judge correctly says 'that if, by means of drunkenness, a permanent or, as Lord Hale to the same effect expressed it, if habitual or fixed, madness be caused, that it will excuse.' See Hale, P. C. pt. 1, ch. 4.

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"In the above extracts we see the law in this respect: A contrary doctrine ought to be frowned out of circulation, if it has obtained it, by every friend to virtue, peace, quietness, and good government. The history of criminals and criminal trials shows that he who has not learned betimes to restrain the evil inclinations of our nature—envy, malice, revenge, and their kindred passions—but has a sufficiency of moral sense left to deter him from the commission of enormity while sober, will often 'screw his courage to the sticking point' by the free use of ardent spirits, and, thus made able to silence the twinges of his conscience, will voluntarily imitate the demon. But let courts once approve the doctrine now contended for, and it will not be resorted to as a plea by persons of this description alone; but even the cold-blooded calculating assassin will never be a sober homicide. He will always exhibit himself at the bar of a court of justice as a specimen of insanity produced by drunkenness. And thus this degrading and disgraceful, yet too common, vice, instead of being hunted from society as the bane of good morals and social and domestic happiness, will be converted into a shield to protect from punishment the worst of crimes. All civilized governments must punish the culprit who relies on so untenable a defense; and in doing so they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents and to guardians, and to youth and society, than 'comes in the cold abstract from pulpits.'

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"In order to be clearly understood, we have supposed the strongest case—a case of entire prostration of intellect immediately occasioned by drunkenness—and have said that that constitutes no excuse. Instances, however, of heinous offenses, committed under such circumstances, are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober."

The foregoing observations set forth in the strongest manner the fallacy of the contentions insisted upon by the prisoner's counsel in the present case, and show how impossible it is, how contrary to the sound policy of the law, and how destructive to public peace and public order, such doctrines would prove, if they should be permitted to gain a foothold in our courts.

It is true that in none of these cases cited was there any question raised as to a misapprehension the prisoner might be under as to the hostile intentions of the party killed; such misapprehension arising solely from the besotted condition of his mind produced by voluntary intoxication. But the principles enunciated cover this phase of the matter fully. After the inquiry is passed as to whether the accused party is guilty of murder in the first degree or murder in the second de-

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gree, no further consideration, under our authorities, is given to the fact of his intoxication. As to all subsequent inquiries he must stand at the bar of justice and be judged by the same rules which measure the conduct of sober men. Indeed, the consequences that would follow any other view are horrible to contemplate. If it be true that the red-handed murderer can say to the court, and be thereby excused, "I killed the man I am accused of killing, because I was very drunk, and did not know what I was doing," or "I supposed, without any foundation in fact, but simply because I was drunk, that he was going to do me great bodily harm, and therefore I killed him," truly the quiet and peaceable and orderly members of every community in the State would be at the mercy of the drunken, the disorderly, and the brutal, and the courts would be powerless to check the quick and certain descent of social order into chaos and ruin. No such license to commit rapine and murder can be issued to vicious, drunken, and besotted men.

It is insisted that at all events the judge of the court below committed error in saying to the jury that drunkenness would not only be no excuse for the commission of the homicide "but rather an aggravation of his offense." This was an incorrect expression on the part of the circuit judge, as held in *Haile v. State*, supra, at page 158 of 11 Humph., next to the last paragraph of the opinion. However, no injury was done to the prisoner by this remark, because the jury gave him the very lowest term they could give him, after finding him

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guilty of murder in the second degree. The statute prescribed as a punishment for that offense confinement in the State penitentiary for a period of not less than ten nor more than twenty years. The jury gave him only ten years. The verdict was a very merciful one. The subject-matter of the second request was fully covered by the charge of the court.

There is no error in the judgment of the court below, and it must be affirmed.

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S. B. LUTTRELL & Co. v. KNOXVILLE, LA FOLLETTE & JEL-
LICO RAILROAD COMPANY *et al.**

(Knoxville. September Term, 1907.)

1. **RAILROADS.** In materialman's suit to enforce lien, sub-contractor is necessary party, when.

In a suit by a materialman to enforce a lien on the property of a railroad company founded on an unadjudicated claim for materials furnished to a subcontractor of the principal railroad contractor for the construction of a railroad tunnel, the subcontractor is a necessary party. (*Post*, pp. 497-504.)

Acts cited and construed: Acts 1881, ch. 67; Acts 1883, ch. 220; Acts 1889, ch. 103; and especially Acts 1891, ch. 98, secs. 1, 2, and 3.

Cases cited and approved: Warner v. Yates, 118 Tenn., 548; Vreeland v. Ellsworth, 71 Iowa, 347; Hardware Co. v. McConnell, 102 Ala., 577; Cumming v. Wright, 72 Ga., 767; Murdock v. Hillyer, 45 Mo. App., 287; Ashburn v. Ayers, 28 Mo., 77; Estey v. Lumber Co., 4 Colo. App., 165; Thompson v. Gilmore, 50 Me., 435.

2. **SAME.** Same. Failure to make subcontractor a party is waived by answer of railroad to merits without objection.

The failure to make the subcontractor a party to the suit described in the first headnote is waived by the defendant railroad's answer to the merits, without making the objection by demurrer or otherwise in the lower court. (*Post*, pp. 501, 504.)

*As to right to lien for explosives, see note to Schaghticoke Powder Co. v. Greenwich & J. R. Co. (N. Y.), 2 L. R. A. (N. S.), 288.

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3. **SAME.** Same. Same. Answer denying the existence and fixing of the lien does not raise objection for nonadjudication against subcontractor or for his not being a party, when.

Objection for failure of complainant in the suit described in the first headnote to establish his claim by adjudication against the subcontractor, or to make the subcontractor a party to such suit, is not made or raised so as to avoid a waiver of the objection by defendant railroad's answer denying that complainant has taken the necessary steps to fix a lien in his favor upon respondent's railroad and property, and denying that complainant has acquired or is entitled to any lien on such property; a construction concurred in by defendant railroad, by permitting complainant's evidence, showing that the materials were furnished to the subcontractor and by him used in the construction of the railroad tunnel, to be admitted without objection. (*Post*, pp. 504, 505.)

4. **SAME.** Defects in notice or absence of notice of lien for materials furnished to a subcontractor may be waived.

In a materialman's suit to enforce a lien for materials furnished to a subcontractor in the construction of a railroad tunnel, defects in complainant's notice to the railroad of his lien, or the failure to give such notice, may be waived by the defendant railroad, and the same is waived by not making objection in the lower court. (*Post*, p. 505.)

Case cited and approved: *Noll v. Railroad*, 112 Tenn., 140.

5. **SAME.** Materialman's lien for materials furnished to a subcontractor may be enforced without attachment.

A materialman's lien against a railroad and its property for materials furnished to a subcontractor in the construction of a railroad tunnel may be enforced in chancery, without attachment of the property sought to be subjected, by a bill framed in strict conformity with the statute creating the lien, with a description of the property whose sufficiency is not questioned in the answer, and resulting in a decree declaring the lien

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upon the property by substantially the same description as that given in the bill, where the statute does not require attachment of the property sought to be subjected. (*Post*, pp. 505-509.)

Acts cited and construed: Acts 1883, ch. 220; Acts 1891, ch. 98, secs. 2 and 3.

Cases cited and approved: *August v. Seeskind*, 6 Cold., 173; *Bryan v. Zarecor*, 112 Tenn., 511; *Trust Co. v. Condon*, 67 Fed., 106, 14 C. C. A., 314.

6. SAME. Rule of liberal construction given to mechanic's lien law is applied to railroad lien law.

The rule of liberal construction uniformly given to the mechanic's lien law to carry out its purpose, and to secure and protect those entitled to the lien, and thereby to promote and encourage improvements, is applied to the railroad lien law. (*Post*, p. 507.)

Cases cited and approved: *Barnes v. Thompson*, 2 Swan, 215; *Alley v. Lanier*, 1 Cold., 541; *Kay v. Smith*, 10 Heisk., 42; *Steger v. Refrigerator Co.*, 89 Tenn., 453; *Ragon v. Howard*, 97 Tenn., 341.

7. SAME. Lien for explosives furnished to a subcontractor to be used in blasting in constructing a railroad tunnel.

A materialman is entitled to a lien against a railroad for explosives furnished to a subcontractor to be used in blasting in the construction of a railroad tunnel, under a statute creating a lien for work and materials furnished in the construction and repair of railroads. (*Post*, pp. 512, 513, 515, 520.)

Acts cited and construed: Acts 1883, ch. 220, sec. 3; Acts 1891, ch. 98, sec. 1.

Case cited and approved: *Powder Co. v. Railroad*, 113 Tenn., 392.

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8. **SAME.** Materialman has lien for materials furnished to a subcontractor to be used in construction or repair of railroad, whether so used or not.

A materialman has a lien for materials furnished in good faith to a subcontractor to be used in the construction or repair of a certain railroad, though such materials are not actually used for the purpose for which furnished. (*Post*, pp. 513, 514.)

Acts cited and construed: Acts 1883, ch. 220, sec. 3; Acts 1891, ch. 98, sec. 1.

Cases cited and approved: Powder Co. v. Railroad, 113 Tenn., 392.

9. **SAME.** No lien for materials furnished to a railroad subcontractor for erection of shanties for his workmen.

A materialman is not entitled to a lien for materials furnished to a railroad subcontractor for the erection of shanties on leased land adjacent to the railroad right of way for the shelter of his workmen. (*Post*, pp. 513, 514, 515.)

Acts cited and construed: Acts 1883, ch. 220, sec. 3; Acts 1891, ch. 98, sec. 1.

Cases cited and approved: Lumber Co. v. Railroad, 33 Neb., 39 (overruling the former opinion in 28 Neb., 39); Dudley v. Railroad, 65 Mich., 655.

10. **SAME.** No lien for tools and machinery and repairs thereof, and the appliances used in operating them; articles specified.

A materialman is not entitled to a lien against a railroad for furnishing to a railroad subcontractor gasoline, gasoline torches and coal oil, used for lighting a railroad tunnel while in process of construction, packing, mattocks, cotton waste, electric light supplies, carts, tools, shovels, spades, blacksmith tools, wagons, scrapers, plows, machines, machinery, derricks, derrick crabs, cables, and repairs for all these, for they are not lienable articles. (*Post*, pp. 509-513, 515-519.)

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Acts cited and construed: Acts 1883, ch. 220, sec. 3; Acts 1891, ch. 98, sec. 1.

Case cited and approved: Powder Co. v. Railroad, 113 Tenn., 392, 396, 397; Powder Co. v. Railroad, 42 Fed., 474; Trust Co. v. Railroad, 23 Fed., 703.

11. **SAME.** No lien for tableware and commissary supplies, nor materials in payment for labor, when.

Under our statute creating the railroad lien, tableware and commissary supplies furnished to a subcontractor and materials furnished to the workmen in part payment for their labor are not lienable articles, for the sense in which they enter into the construction of the railroad is too remote. (*Post*, pp. 519, 520.)

Acts cited and construed: Acts 1883, ch. 220, sec. 3; Acts 1891, ch. 98, sec. 1.

Case cited and approved: Powder Co. v. Railroad, 113 Tenn., 392, 396, 397.

12. **SAME.** Lien for specified articles furnished to a subcontractor to be used in the construction of a railroad tunnel.

A materialman is entitled to a lien against a railroad for furnishing to a railroad subcontractor dynamite, fuse, blasting wire, wire fuse, nails, nuts, washers, bolts, soft steel and iron which went into the construction of the lining and approaches to the railroad tunnel. (*Post*, pp. 509, 510, 515, 520.)

Acts cited and construed: Acts 1883, ch. 220, sec. 3; Acts 1891, ch. 98, sec. 1.

FROM ANDERSON.

Appeal from the Chancery Court of Anderson County.
HUGH G. KYLE, Chancellor.

TEMPLETON & TEMPLETON, for complainants.

CORNICK, WRIGHT & FRANTZ and X. Z. HICKS, for defendant railroads.

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SHIELDS, CATES & MOUNTCASTLE, for defendant Mason & Hoge Co.

MR. SPECIAL JUSTICE HENDERSON delivered the opinion of the Court.

The original bill was filed in the chancery court of Anderson county February 3, 1905, by complainants, a copartnership engaged in the hardware business at Knoxville, against the Knoxville, La Follette & Jellico Railroad Company, a Tennessee corporation, the Louisville & Nashville Railroad Company, a Kentucky corporation, and Mason & Hoge Company, a corporation or copartnership, defendants.

Complainants furnished materials and supplies, etc., to G. H. Cole & Co. to the amount of \$10,506.45, which were used in the building and construction of Dossett's tunnel on the defendant's railroad, said G. H. Cole & Co., being subcontractors under Mason & Hoge Company; and the prayer of the bill is to have their account declared a lien on the property of the railroads, under chapter 98, p. 215, of the Acts of 1891.

After certain interlocutory orders and report of special master, the chancellor declared a lien for a portion of the account, and refused to do so for the balance, dismissing the bill as to Mason & Hoge Company. Complainants have appealed from the portion of the decree that disallows the lien; and the two railroad companies appeal from the portion of the decree adverse to them. Both sides have assigned errors.

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We first consider the first assignment of error by the railroad companies, as that presents a preliminary question. This assignment is as follows:

"The chancellor erred in holding and decreeing that the complainants have acquired a lien on the property of the appellant railroad companies, under this proceeding, for any part of their alleged account against G. H. Cole & Co. There is no privity of contract between the complainants and either of the defendants, and as G. H. Cole & Co. are not sued, and the property of the defendants is not brought into the custody of the court by attachment, the chancery court did not acquire jurisdiction either of the person against whom complainants would be entitled to a judgment or of the property which they seek to have subjected to the payment of their alleged claim against G. H. Cole & Co., and the decree of the chancery court in this cause is absolutely void."

This is a suit upon an open, unliquidated account for materials, etc., furnished G. H. Cole & Co., the subcontractors, and which were used in the construction of the railroad. It is argued that it is necessarily a proceeding to recover judgment *in personam* against the subcontractors, and a proceeding *in rem* against the property in which the subcontractor has no interest, and that, to enable the court to pronounce judgment *in rem*, complainants must first obtain a personal judgment against the subcontractor and bring the property of the railroad into the custody of the court by attachment, or, at least, that the subcontractor is a necessary

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party to the proceeding to enforce the lien under chapter 98, p. 215, of the Acts of 1891.

The act of 1891 amends chapter 220, p. 296, of the Acts of 1883, and the lien is given by section 1, p. 215, of the Acts of 1891, to the materialman and others on the property of the railroad "in as full and ample a manner as is now provided by law for persons contracting directly with such railroad company for any such work and labor done or for materials furnished, provided that within ninety days after . . . such materials are furnished . . . such materialman . . . shall notify in writing any such railroad company or the owner of such railroad, should it or they reside in the State, or its or their agents or attorneys, should it or they be beyond the limits of the State, that said lien is claimed, specifying in the face of said notice the character of the . . . materials furnished, and the value thereof; and said lien shall continue for the space of one year from the service of said notice, and continue until the termination of any suit commenced for the enforcement of said liens, brought within said one year; and said liens shall have priority over all other liens on such railroad, its property and franchises."

Section 2 provides "that the liens provided for in this act may be enforced by suits brought against such railroad company in the circuit or chancery court of the county or district where the work or material, or any

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part thereof, was done or furnished, or any part of said services was rendered."

Section 3 provides "that the plaintiff shall set out in his declaration or bill, as the case may be, with reasonable certainty, the work done, services rendered or materials furnished, the amount claimed therefor, the nature and substance of any contract made with such railroad company, or any contractor or construction company, or subcontractor, as the case may be, accompanying such declaration or bill, with a copy of the notice executed, as required in the first section of this act. And such suit shall be docketed and conducted as other suits in said courts."

The bill in this case by its averments fully complies with above directions of the act with regard to notice. G. H. Cole & Co., the subcontractors to whom the materials were furnished, are not made parties. The bill alleges that the Mason & Hoge Company had the contract originally with the railroad company to construct the Dossett tunnel. They sublet the work of construction to G. H. Cole & Co. as subcontractors, to which the railroad company agreed.

This latter company began the work of construction September 15, 1902, but failed to comply with the terms of their contract, and certain modifications of the contract were agreed upon between them and Mason & Hoge Company. G. H. Cole & Co. finally failed to carry out their contract and became wholly insolvent, so that, under the provisions of the contract between the two,

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the Mason & Hoge Company, on November 30, 1903, took charge themselves of the work. G. H. Cole & Co., voluntarily retired from the work, and delivered to Mason & Hoge Company all the materials then on hand, which had been furnished by complainants to the former company, and the latter company prosecuted the work to completion, completing it the 1st of April, 1905.

The bill exhibits an itemized statement of the account of materials, supplies, etc., furnished by complainants to G. H. Cole & Co., showing a balance due thereon and unpaid of \$10,506.45, and alleges that the whole of these were used in the construction of the tunnel, a part by G. H. Cole & Co., and the remainder by Mason & Hoge Company.

The railroad companies answer to the merits, and interpose no objection by demurrer or otherwise on account of the failure of complainants to make G. H. Cole & Co. parties. The Mason & Hoge Company, also, answer fully to the merits.

The railroad company holds a contract of indemnity from Mason & Hoge Company, and that company, in their answer, admit that certain portions of the materials furnished by complainants to G. H. Cole & Co., amounting to \$467.38, are liens. They tender this amount to complainants in full settlement of their claim. It being refused, the money is paid into court; and they deny that complainants are entitled to lien for any of the other articles.

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While the act does not expressly provide that the party to whom the materials are furnished, the subcontractors, G. H. Cole & Co., in this case shall be made parties, the authorities are to the effect that this is necessary. In 2 Jones on Liens, section 1303, it is said:

"A subcontractor who holds an open, unsettled, or disputed account against the principal contractor should obtain an adjudication of this before seeking to establish a lien against the owner, or at the same time that he seeks to do so. He should either obtain a judgment against the contractor before bringing an action to enforce the lien, or he should make the contractor a party to that action. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the contractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be furnished with an adjudicated claim, and not with a mere open account."

In *Vreeland v. Ellsworth*, 71 Iowa, 347, 23 N. W., 374, it is said:

"We have the question whether a subcontractor, who holds an open, unliquidated, and unsettled account against the principal contractor, may bring his action against the owner of the building or improvement, and establish a mechanic's lien upon the property, without adjudicating the claim or attempting to adjudicate in

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any way against the contractor, who is the person primarily liable upon the account. We think this question must be answered in the negative. If the claim were liquidated, it may be the principal contractor would not be a necessary party. But that question we need not determine. This is an open, unliquidated account—a mere charge against the contractor. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the subcontractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be furnished with an adjudicated claim, and not with a mere open account.”

To the same effect are the following: *May & Thomas Hardware Co. v. McConnell*, 102 Ala., 577, 14 South., 768; *Cumming v. Wright*, 72 Ga., 767; *Murdock v. Hill-yer*, 45 Mo. App. 287; *Ashburn v. Ayers*, 28 Mo., 77; *Estey v. Hallack, etc., Lumber Co.*, 4 Colo. App., 165, 34 Pac., 1113; *Thompson v. Gilmore*, 50 Me., 435.

In *Warner v. Yates & Co.*, 118 Tenn., 548, 102 S. W., 92, which was under chapter 67, p. 79, of the Acts of 1881, as amended by chapter 103, p. 207, of the Acts of 1889, construing that peculiar statute, it is said: “The principal contractor is a necessary party, because he is the debtor sued, and the owner of the property, because it is sought to reach his or her property. They are both interested, and must have their day in court; otherwise,

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there would be a failure of due process of law. The principal contractor has the right to controvert the indebtedness claimed, and the owner of the property the existence of the lien sought to be enforced, and the action cannot be maintained without establishing both the debt and the lien."

While it is true that G. H. Cole & Co. are proper parties, we think that the railroad companies have waived their right to make the question by answering to the merits, without making the objection by demurrer or otherwise.

It is insisted that the amendment to the answer makes the question, where it is denied "that the complainants have taken the necessary steps in this case to fix a lien in their favor upon respondents' railroad and property, and they deny that complainants have acquired or are entitled to any lien upon respondents' property for the payment of their alleged claim."

This is no more than a repetition of the denials of the answer as originally filed, which simply make an issue upon the allegations of the bill as to whether the materials claimed were furnished to G. H. Cole & Co., for the construction of the tunnel, and were used for that purpose, whether the notice has been given as prescribed by the statute, whether the bill has been filed in time thereafter—in short, whether complainants had taken the proper preliminary steps prescribed in the act, so as to enable them to maintain a suit to enforce the lien.

Looking to these pleadings, and the decree of the

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chancellor, it does not appear that the question of the failure of complainants to first establish their claim against G. H. Cole & Co. by suit and judgment, or to make them defendants in this case, was made in the lower court, or directly raised or determined there; and it cannot be made in this court.

In addition to this, the evidence by complainants to show that the materials claimed were furnished G. H. Cole & Co. and by them used in the construction of the tunnel, was admitted without objection on the part of defendants.

In the case of *Noll & Thompson v. Railroad*, 112 Tenn., 140, 79 S. W., 380, it is held that the defects in a subcontractor's notice to, a railroad of his lien, or the failure to give such notice, may be waived by defendant, and same is waived by not making the objection in the court below. It is said in that case:

"The object of the notice required by the statute is to apprise the railroad company of the amount claimed, and thus put it in a position where it can protect itself against overpayments to the original contractor. While it performs this important function, yet, like any other benefit, it may be waived by the party in whose interest it is created. And a waiver can very well be assumed unless a timely objection is made to the notice. Such objection, we think, comes too late when made for the first time on appeal."

It is next insisted that the decree of the chancellor is erroneous, because the chancery court has not ac-

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quired jurisdiction over the property of the railroad companies, and no authority to enforce any lien thereon, because complainants did not bring the property into the custody of the court by attachment or other appropriate process.

There is no provision in the act of 1891, and none in the act of 1883, requiring the issuance and levy of attachment on the property sought to be subjected.

The bill is framed in strict conformity with the provisions of sections 2 and 3 of the act. It describes the lines of railroad upon which the lien is sought as leading from Jellico, through the counties of Campbell, Anderson, and Knox, to Knoxville. The contract for the construction of a large part of this line was awarded to Mason & Hoge Company, who sublet a part of the construction to G. H. Cole & Co., including that portion of the road comprising Dossett's tunnel and its approaches thereto; the portion thus sublet lying in Anderson county.

The bill is sworn to, but no attachment is issued. No question is made in the answer with regard to the description of the property; and by the decree of the chancellor the lien is declared upon the property by substantially the description given in the bill.

Referring to creditors' bill to set aside fraudulent conveyances, where the court has proper service on defendant, it is said, in the case of *August & Bing v. Seeskind et al.*, 6 Cold., 173:

"Having thus obtained jurisdiction, the court may

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rightfully proceed to decree upon the equity of the cause, and give such relief to the complainant as may be suitable to the equity alleged and established. If the subject-matter of the controversy be property of any kind, the court may decree such relief as may be proper to the equities of the parties, and execute such relief by process suitable to the purpose. Seizure of the property, pending the litigation, or at the beginning, is not generally essential to give the court jurisdiction over it and to enforce the proper relief in respect of it."

It is further said that if, during the progress of the suit, fear arises that the property may be wasted, upon proper showing the chancellor will issue process to seize and impound it. This is only auxiliary to the jurisdiction of the court. "But," as said, "it is not essential to the jurisdiction of the court, to enable it to proceed to decree upon the matter in controversy, that the property be seized or impounded."

The right of the court of equity to enforce a lien upon property without seizure by attachment is enforced in *Bryan v. Zarecor*, 112 Tenn., 511, 81 S. W., 1252, when the property is specifically described in the bill.

In *Central Trust Co. v. Condon*, 67 Fed., 106, 14 C. C. A., 314, the case was a bill to enforce a lien of subcontractors and materialmen under the act of 1883. The facts arose before the passage of the amendatory act of 1891. The bill set out the facts constituting the lien, and described the property, and prayed for a sale of the property. There was no attachment prayed for or is-

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sued. Judge Taft, speaking for the court of appeals of the sixth circuit of the United States, said: "It is clearly a suit to enforce a subcontractors' lien, for otherwise the court could not enforce it."

He further says: "The statute does not provide that an attachment should issue in suits to enforce railroad liens. It is true that under the mechanic's lien law of Tennessee the lien must be enforced by attachment, but this is because the section expressly requires it. There is no such provision in the railroad lien law. The lien of the principal contractor is to be enforced merely by suit, and the form of the declaration is prescribed in the statute. The lien of the subcontractor may be enforced by suit against the principal contractor as principal debtor and against the company as garnishee, but there is not a suggestion in the statute that attachments are necessary to the perfecting of a lien."

The uniform policy has been to give to the mechanic's lien law a liberal construction to carry out its purpose, and to secure and protect those entitled to the lien, and thereby to promote and encourage improvements. *Barnes v. Thompson*, 2 Swan, 215; *Alley & Burk v. Lanier*, 1 Cold., 541; *Kay v. Smith*, 10 Heisk., 42; *Steger v. Arctic Refrigerator Co.*, 89 Tenn., 453, 14 S. W., 1087, 11 L. R. A., 580; *Ragon v. Howard*, 97 Tenn., 341, 37 S. W., 236. In the last-named case it is said: "It is, and has been, the policy of our law to protect and enforce this lien of mechanics and furnishers and not allow them to be defeated by any technical niceties of construction."

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Without further discussion of the authorities, we think this first assignment of error by the railroad companies is not well taken, and the same is overruled.

Upon final hearing the chancellor decrees that complainants are entitled to lien upon the property of the railroad for any dynamite, fuse, blasting powder, blasting wire, wire fuses, gasoline and gasoline torches, coal oil, nails, nuts and bolts, soft steel and iron, and building material for shanties for the men, shown on the account, but that complainants are not entitled to lien for any of the other articles set out in the account. As the parties cannot agree upon the value of the articles so declared liens, the cause is referred to R. H. Sansom, Esq., who is appointed special commissioner, or master, to report thereon.

It is further adjudged that complainants have a lien on the property of the railroad for the payment of what may appear to have been declared a lien upon the coming in of the report of the special master, notwithstanding the fact that they caused no injunction to be issued, and no attachment to be issued and levied on the property of the railroad.

The special master makes his report in accordance with this reference, which is confirmed, without exception by either side, by final decree in the cause; and it is decreed that complainant have a lien for the following:

Dynamite, fuse, blasting wire, and wire fuse.	\$ 267.84
Gasoline	224.95
Gasoline torches	49.50

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Coal oil	53.78
Nails, nuts, washers, bolts, soft steel, and iron	803.72
Building material for shanties	855.43

Making total \$2,255.22

The railroad companies are allowed 30 days in which to pay said amount into court, and upon default their property is decreed to be sold.

The second assignment of error by the railroad companies is with regard to the allowance of lien for the articles above referred to, aggregating \$2,255.22. While defendants contest lien for any amount upon their property, Mason & Hoge Company paid into court an amount to cover the first item above of \$267.84, and also \$201.72; the latter sum being that part of the item for nails, nuts, etc., of \$803.72, which they admitted are lienable. This thus leaves the remainder of that allowed by the chancellor to which defendants' assignment of error applies.

The assignments of error by complainants are with reference to the balance of their account, less the sum of \$1,848.07, which was for steel rails used in the construction of a tramway, but were not consumed in use; the claim being for all materials and supplies furnished G. H. Cole & Co. that were consumed in their use for the construction of the tunnel which consist of all the other articles in their account, the subcontractor's plant and outfit, machinery, tools, etc., and repairs of same, and supplies for same.

It may be said that the assignments of error of both

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complainants and defendants relate to materials furnished for all these purposes, for some of which the chancellor allowed lien, and for some he did not.

The title to chapter 220, p. 296, of the Acts of 1883, is "An act to protect contractors, subcontractors, mechanics, laborers, and engineers who perform work or furnish materials for the construction or repair of railroads."

Chapter 98, p. 215, of the Acts of 1891, was to amend that act, as stated in its title, "providing a prior lien for and giving greater security" to the parties named therein. The portion of section 1 of this act necessary to be referred to in this connection is as follows:

"That section 3 of an act passed March 29, 1883, as referred to in the caption of this bill, the same being section 2778 of Milliken & Vertrees' Compilation of the Laws of Tennessee, be and the same is hereby amended so as to provide that hereafter every subcontractor, laborer, materialman or other person who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, or furnishes cross ties or masonry or bridge timbers for the same, which is used in the building and construction of such railroad, its bridges and culverts, or who lays or aids in the laying of its track, building of its bridges, the erection of its depots, platforms, wood or water stations, section houses, machine shops or other buildings, or for the delivery of material for any of these purposes, or for any

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engineering or superintendence, or who performs any valuable service, manual or professional, by which any such railroad company receives a benefit, all and every such person or persons shall have a lien on such railroad, its franchises and property, for the value of such work and labor done, or material furnished, or services rendered, as hereinbefore set out and specified, in as full and ample a manner as is now provided by law for persons contracting directly with such railroad company for any such work and labor done, or for material furnished. . . .”

As already stated, the material, supplies, etc., were furnished by complainants to G. H. Cole & Co., subcontractors under Mason & Hoge Company, and they were used and consumed in the construction, for the Knoxville, La Follette & Jellico Railroad Co., of the Dossett tunnel, a tunnel about one thousand two hundred yards long, which required about three years for completion.

The lien is conferred alone by the act, and its language must, of course, control. The lien is given in favor of the materialman “for the delivery of material” to the subcontractor “who performs any part of the work in grading any railroad company’s roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, . . . or who lays or aids in the laying of its track.”

In *Powder Co. v. Railroad*, 113 Tenn., 392, 83 S. W., 354, 67 L. R. A., 487, 106 Am. St. Rep., 836, it is held

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that explosives, furnished to G. H. Cole & Co., used in blasting in this Dossett's tunnel, are materials for which the furnisher is entitled to lien. It is said: "The consumption of explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are material which enter into the building and grading of the road, as much so as trestles, bridges, and culverts contain materials which are necessary to the grading of the road at such places as require trestles and bridges and culverts."

We refer first to the building materials furnished for the erection of shanties. These shanties were erected on lands adjacent to the right of way for the railroad, and upon lands leased for that purpose, and they were used for shelter for the workmen.

Upon the question as to whether the materialman has a lien for materials furnished in good faith to be used in the construction, but which in fact were not used, the court, in *Powder Co. v. Railroad*, 113 Tenn., 404, 83 S. W., 354, 67 L. R. A., 487, 106 Am. St. Rep., 836, cites the case of *Stewart Chute Lumber Co. v. Missouri Pacific Railway Co.*, 28 Neb., 39, 44 N. W., 48, decided by the supreme court of Nebraska, under the statute of that State somewhat similar to ours. The holding of that case is approved to the effect that the lien of the materialman attaches upon the delivery in good faith of the material to the subcontract-

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or, and it is not necessary that the material furnished should have been actually used in the improvement.

This Nebraska case further held that lumber and other material furnished to the subcontractor for the erection of shanty boarding houses for the workmen and stables for the horses, erected adjacent to the right of way of the railroad, were liens under that statute. The decision in that case on this subject was by a divided court, and upon rehearing it was overruled by the opinion reported in 33 Neb., 39, 49 N. W., 769. This decision is based upon the particular language of the Nebraska statute. There the lien is given for material which "shall have been furnished or labor performed in the construction, repair and equipment of any railroad." The court says:

"These words do not include lumber, material, or labor which was not performed or furnished in the construction, repair, or equipment of the road. If this were not so, there would be no limit to the liability of a railway company. If, by a strained construction of the statute, the company is held liable for material used for shanties, it would by the same rule be liable also for food and clothing for the employees and feed for the teams; and it would be difficult to tell where its liability would cease. The lien is created by statute, and independently of that no cause of action exists against the company."

The court cites as in accord the case of *Dudley v. Railway Co.*, decided by the supreme court of Michigan, and reported in 65 Mich., 655, 32 N. W., 885.

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The first decision in the Nebraska case is referred to in *Powder Co. v. Railroad*, as authority that the materialman is entitled to a lien for materials furnished in good faith to the subcontractor, whether they were actually used in the construction or not. The holding of the Nebraska case that there was a lien for the lumber furnished for the shanties and stables is referred to only incidentally.

The materials furnished for these shanties were not put upon the right of way of the railroad, and did not go into the construction thereof, and are not lienable material under the act.

The other articles for which the chancellor allowed lien are gasoline, gasoline torches, and coal oil. They were used for lighting the tunnel. The gasoline torches were used as small vessels to contain and utilize the gasoline; the work in the tunnel having been prosecuted day and night. The other articles, for which lien was denied, consist of packing, mattocks, cotton waste, electric light supplies, carts, tools, shovels, spades blacksmith tools, wagons, scrapers, plows, machines, machinery, derricks, derrick crabs, cables and repairs for all these.

Counsel for complainant in their brief say: "Confessedly the dynamite and the powder are liens; but the dynamite and powder could not be used without the drill to bore the hole in the rocks, and the drill could not be used without the engine and boiler, and the engine and boiler could not be used without the cotton

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waste and the lubricating oil. The cotton waste and the oil and the steel drills were all alike completely consumed in the use."

The contention is that complainants are entitled to lien for the articles referred to, because, from the character of the work of construction and the length of time required, they were necessarily consumed or destroyed in the use, some within a few hours or days, while some would last for months, and all were indispensable to the work.

The same principle can be as properly applied with regard to horses and mules that may be employed in hauling, which, on account of the hard and heavy draughts and long-continued work, are broken down and rendered worthless and useless. And thus the furnisher would have a lien on the railroad property for the whole outfit of the subcontractor, in addition to all the materials which were furnished for, or went into, the construction.

This would be a construction of the act which extends far beyond the intention of the legislature. The test is not whether the article furnished was consumed in its use, either instantly, as in case of explosives, or by degrees from long and hard use. If lien is allowed for tools and machinery, and horses and mules, for complete destruction, on the same principle it should be allowed for deterioration in value *pro tanto*, when not completely destroyed.

In *Powder Co. v. Railroad*, *supra*, the following is

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quoted from Elliott on Railroads: "But a lien cannot be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge, under a statute authorizing a lien for all materials 'used in and about' the construction of a bridge."

In this connection it is said (pages 396, 397):

"All of the decisions upon this subject draw a clear distinction between the explosives and explosive supplies used in the construction of a railroad company's roadway, and which are necessarily consumed in the use thereof, and machinery and tools furnished for that purpose, which are held to be a part of the contractor's plant, and which do not go into the building of the roadway, but retain their identity and fitness for future use, saving the limited and gradual wear and tear incident to such use. The explosives which are necessarily consumed in the use are held to be liens, while the tools and equipment which constitute the contractor's plant do not constitute liens under the several lien statutes."

There is cited in support of this the case of *Giant Powder Co. v. Oregon Pacific Railway Co.* (C. C), 42 Fed., 474, 8 L. R. A., 700, distinguishing the case of *Basshor v. Railroad Co.*, 65 Md., 99, 3 Atl., 285.

Rapalje & Mack's Digest of Railway Law, vol. 6, p. 284, digests many cases upon this question, and lays down the rule as adjudged therein in the following language:

"In providing that a materialman shall have a lien for all materials furnished for, or used in and about, the

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construction of bridges, the law means such material as ordinarily enter into or are used in the construction of bridges, and are fairly within the express or implied terms of the contract between the owner and the contractor. It does not mean the machinery that may be used for the manufacture of the materials themselves.

“Where a contractor for building a bridge buys machinery for crushing stone to be used in the manufacture of artificial stone for the masonry work, and also appliances to carry the manufactured stone to the place where it is to be used, the seller of such machinery and appliances has no lien therefor under the provision of Maryland mechanic’s lien law, which gives a materialman a lien for all materials furnished for, or used in and about, the construction of bridges.”

Section 3200, Rev. St. Mo. 1879 [Ann. St. 1906, section 4239], provides “that all persons who shall do any work or labor in constructing or improving the roadbed, rolling stock, station houses, depots, bridges or culverts of any railroad company, . . . and all persons who shall furnish ties, fuel, bridges or material to such railroad company, shall have . . . a lien,” etc. In the case of *Central Trust Co. v. Texas & St. L. Ry. Co.*, (C. C.), 23 Fed., 703, the United States circuit court held that “lubricating and illuminating oils are not ‘materials,’ within the meaning of section 3200 of the Missouri Revised Statutes, and parties furnishing them are not entitled to any statutory lien.”

If the tools, carts, and machinery furnished as a part

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of the subcontractor's outfit are not lienable articles under the act, it follows that the repairs and appliances used or needed in operating same would stand on the same ground.

Lastly, lien is claimed for the table ware and commissary supplies.

It is claimed that these articles were necessary to afford to the workmen cooking stoves, table furnishings, and supplies in a commissary which was kept by the subcontractor, and the material furnished to the workmen in part payment for their labor.

Again, in *Powder Co. v. Railroad*, supra, the court adopts the language of the authority there cited, that "the food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used."

In *Elliott on Railroads*, section 1068, it is said: "So of course, groceries and food furnished for the workmen, while in a sense used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them."

The stove upon which to cook the food, and the tableware out of which to eat it, are too remote; and the legislature did not intend to give lien for such. The same principle would apply to clothing furnished the workmen, bedclothing upon which to sleep, coal and wood for

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fires by which to warm, and it might be extended indefinitely to any number of luxuries.

The result of the above holding is that none of the materials included in the account of complainants, made exhibit to the bill, are lienable materials, excepting the items for dynamite, fuse, blasting wire, and wire fuse, and the items for nails, nuts, washers, bolts, soft steel and iron, which went into the construction of the lining and approaches to the tunnel.

The cause is remanded to the chancery court, to be further proceeded with in accordance with this opinion. The costs of the appeal will be paid by complaintants. The costs of the chancery court will be paid as adjudged by the chancellor.

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STATE v. FRANK SMITH.

(*Knowville*. September Term, 1907.)

1. **CONSTITUTIONAL LAW.** Amendatory statute must recite the title or substance of the law sought to be expressly amended.

Acts 1899, ch. 381, expressly undertaking to amend Acts 1897, ch. 106, making it a felony for any one to knowingly, willfully, and maliciously cut or remove timber, for market, from the land of another, without the owner's consent, by striking out the words "and maliciously," is void because of its failure to recite in its caption or otherwise the title or substance of the law sought to be amended as required by the constitution. (*Post*, p. 524.)

Acts cited and construed: Acts 1897, ch. 106; Acts 1899, ch. 381.

Constitution cited and construed: Art. 2, sec. 17.

Case cited and approved: Railroad v. State, 110 Tenn., 598.

2. **INDICTMENTS.** For statutory offenses should pursue the statute; substituted equivalent word does not invalidate indictment.

It is always best for the indictment for a statutory offense to pursue the words of the statute; but where a substituted word is equivalent to the one in the statute, or is of more extensive signification, and includes it, the indictment will be sufficient. (*Post*, pp. 524, 525.)

Cases cited and approved: Peek v. State, 2 Humph., 85; Starks v. State, 7 Bax., 65; State v. Pennington, 3 Head, 120.

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3. CRIMINAL LAW. Word "knowingly," as used in criminal statutes, defined.

The word "knowingly," as used in criminal statutes, means that state of mind wherein the person charged was in possession of facts under which he was aware he could not lawfully do the act whereof he is charged; knowledge of the law being necessarily imputed to him, as in all criminal cases. (*Post*, p. 525.)

Case cited and approved: *McGuire v. State*, 7 Humph., 54.

4. SAME. Word "willfully," as used in criminal statutes, defined.

The word "willfully," as used in criminal statutes, means intentionally; that is, that the person doing the act intended at the time to perform the particular act. (*Post*, p. 525.)

5. SAME. Word "maliciously," as used in criminal statutes, defined.

The word "maliciously," used in a criminal statute as appears in the first headnote, is used in the broad, legal sense of criminal intention, or that state of mind of a person who does a wrongful act intentionally or willfully, and without legal justification or excuse. (*Post*, p. 525.)

6. SAME. Words "knowingly," "willfully," and "maliciously," taken together, defined.

The words, "knowingly," "willfully," and "maliciously," taken together, contemplate a case wherein a man acts advisedly, intentionally, and with criminal intent, or that state of mind of a person who does a wrongful act intentionally or willfully, and without legal justification or excuse. (*Post*, pp. 525, 526.)

7. SAME. Word "feloniously" defined; and includes "maliciously."

The word "feloniously" means with a deliberate intent to commit a wrongful act, contrary to law, constituting an offense, an act done with intent to commit a crime, and, as so used, includes "maliciously." (*Post*, pp. 526, 527.)

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Cases cited and approved: Young v. Commonwealth, 12 Bush (Ky.), 243; Alkman v. Commonwealth, 18 S. W., 937, 13 Ky. Law Rep., 894; Shotwell v. State, 43 Ark., 347; Commonwealth v. Carson, 166 Pa., 183; Whitman v. State, 17 Neb., 224.

8. **SAME.** Substitution of "feloniously" for "maliciously" does not vitiate the indictment, when.

The substitution of the word "feloniously" for the word "maliciously" in an indictment under the statute stated in the first headnote is sufficient, and does not vitiate the indictment. (*Post*, pp. 525-527.)

FROM BLEDSOE.

Appeal in error from the Circuit Court of Bledsoe County.—JOSEPH C. HIGGINS, Judge.

ATTORNEY-GENERAL CATES, for State.

No counsel marked for Smith.

MR. JUSTICE NEIL delivered the opinion of the Court.

The indictment in this case charged that the plaintiff in error "on the — — — day of April, 1906, and on divers other days prior to that date, and up to the finding of this indictment, in the State and county aforesaid, did unlawfully, knowingly, willfully, and feloniously cut and remove from said tract of land" (previously described in the indictment) "timber growing upon said

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land, for the purpose of marketing the same, without the consent of said John C. Myers and William C. Johnson, the owners in fee of said tract of land, contrary to the said form of the statute in such case made and provided, and against the peace and dignity of the State."

This indictment was based on chapter 106, p. 257, of the Acts of 1897. That act provides that it shall be a felony for any one to "knowingly, willfully, and maliciously cut or to remove, for the purpose of marketing the same, timber from the lands of another, without the consent of the owner of the timber so cut or removed."

By chapter 381, p. 889, of the Acts of 1899, an effort was made to amend the foregoing statute by striking out the words "and maliciously;" but this latter act is void, because it violates article 2, section 17, of the constitution, since it does not recite in its caption or otherwise the title or substance of the law sought to be amended. *Memphis Street Ry. Co. v. State*, 110 Tenn., 598, 75 S. W., 730.

In the court below the indictment in the present case was quashed because it omitted the word "maliciously," and substituted therefor the word "feloniously." The question to be determined is whether the substituted word supplied the place of the word omitted.

It is always best to pursue the words of the statute; but where a word not in the statute is substituted for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive

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signification than it, and includes it, the indictment will be sufficient. *Peek v. State*, 2 Humph., 85; *Starks v. State*, 7 Baxt., 65; *State v. Pennington*, 3 Head, 120.

In order to a correct determination of the question whether the word "feloniously" was a proper substitution for the word "maliciously" in the statute referred to, it is necessary that we construe all three of the significant words defining the offense, and ascertain the meaning of the word "maliciously" in the connection in which it stands.

The word "knowingly" has been construed by this court as being that state of mind wherein the person charged was in possession of facts under which he was aware he could not lawfully do the act whereof he was charged; knowledge of the law being necessarily imputed to him, as in all criminal cases. This was held in a case wherein the party was indicted for illegal voting under a statute which provided that "any person who shall knowingly vote at any election, not being at the time a qualified voter in the county in which he so votes, shall be adjudged guilty of a misdemeanor," etc. *McGuire v. State*, 7 Humph., 54. "Willfully" means intentionally; that is, that the person doing the act intended at the time to perform that act. The word "maliciously," in the connection in which it appears, is used in the broad, legal sense of criminal intention, or that state of mind of a person who does a wrongful act intentionally or willfully, and without legal justification or excuse. The three terms taken together contemplate a

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case wherein a man acts advisedly, intentionally, and with criminal intent, in the sense in which the latter expression has been just explained. The word "feloniously" fully covers the meaning of the word "maliciously" just indicated.

"Feloniously" is defined in the Century Dictionary as follows: "With deliberate intent to commit a wrongful act, the act being in law such as constitutes a crime of the class termed felonies." In Webster's International Dictionary one meaning attached to the word is: "In a legal sense, done with the intent to commit a crime."

In comparing the judicial definitions of the words "felonious" and "feloniously" in Words & Phrases Judicially Defined, vol. 3, p. 2731 et seq., with the judicial definitions of the word "malicious" in volume 5 of the same work, at page 4307, it is found that these words are often construed to have the same meaning, viz: "with criminal intent," or "with intent to commit a crime."

In *Young v. Commonwealth*, 12 Bush (Ky.), 243, and in *Aikman v. Commonwealth*, 18 S. W., 937, 13 Ky. Law Rep., 894, it is held that the word "feloniously" includes "maliciously and unlawfully."

In *Shotwell v. State*, 43 Ark., 347, it was held that where the word "maliciously" was used in a statute providing punishment for burglary, in charging the offense the use of the words "feloniously, willfully, and burglariously," instead of "willfully and maliciously," was sufficient, as by the use of the word "maliciously"

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in the statute the legislature did not intend that malice towards the owner should become an element in the intent.

In Pennsylvania it is held that the word "feloniously" includes "maliciously." *Commonwealth v. Carson*, 166 Pa., 183, 30 Atl., 985. And in *Whitman v. State*, 17 Neb., 224, 22 N. W., 459, it was held that "maliciously" is included in the words "unlawfully, willfully, purposely, and feloniously."

On the grounds stated, we are of the opinion that the substitution of the word "feloniously" for the word "maliciously" in the indictment under examination was sufficient, and the circuit judge erred in quashing the indictment.

The judgment will therefore be reversed, and the cause remanded for issue and trial.

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SOUTHERN RAILWAY COMPANY v. BICKLEY, MCCLURE &
COMPANY.

(*Knoxville*. September Term, 1907.)

1. **COMMON CARRIERS.** Delivery of trunk is essential to create liability for its loss.

Delivery of a trunk, actual or constructive, to a common carrier is essential to render it liable as such for its loss. (*Post*, pp. 530, 532.)

2. **SAME. Same.** Delivery of trunk check issued by one railroad to the agent of another railroad is not a constructive delivery of the trunk to the latter railroad, when.

There is no constructive delivery of a trunk to a railroad so as to render it liable for the loss thereof, where its station agent accepted a check issued by another railroad for its transportation to a station common to both railroads, at which they had a common agent and common depot, and agreed to have the trunk brought over the line of his railroad, and to forward it to the destination of the person delivering the check, but failed to do so, and the trunk was subsequently burned while at the said common station to which it was checked by the accepted check.

Case cited and approved: *Stewart v. Gracey*, 93 Tenn., 314.

Case cited and distinguished: *Railroad v. Weaver*, 9 Lea, 38.

3. **APPEALS.** Dismissal of suit upon reversal of judgment for plaintiff without a jury, when.

Upon reversal of a judgment rendered in favor of the plaintiff by the lower court, without the intervention of a jury, the supreme court will dismiss the suit. (*Post*, p. 536.)

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FROM KNOX.

Appeal in error from the Circuit Court of Knox County.—JOHN W. GREEN, Special Judge.

LINDSAY, YOUNG & SMITH and JOUBOLMON, WELCKER & SMITH, for Railroad.

SHIELDS, CATES & MOUNTCASTLE, for Bickley, McClure & Co.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

This is an action to recover from the Southern Railway Company the value of the contents of a trunk which the defendants in error claim was lost by fire while in the possession of that company as a common carrier.

The record shows that one Armstrong was an employee of the defendants in error, traveling in their interest and carrying with him a number of trunks containing samples of merchandise for the purpose of exhibition to the trade. In his testimony Armstrong states that at Pennington Gap, in Virginia, on the line of the Louisville & Nashville Railroad, he checked the trunk in question to Cumberland Gap, a station of the road in this

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State; that he did not accompany the trunk, but drove through the country to Tazewell, a town on the line of the Southern Railway Company, about twelve or fourteen miles south of Cumberland Gap; that on his arrival at Tazewell he found the agent of the Southern Railway Company at his place of business, and asked him if he could not have this trunk brought over on the morning train of that company, and upon his saying he could he (Armstrong) delivered the check issued to him at Pennington Gap to this agent; that the next morning he returned to the station, when the agent volunteered the statement that the trunk would be on the train then due, and that, relying on this being done, he (Armstrong) left Tazewell over the line of this railway for Knoxville, the agent agreeing that the trunk should be shipped to this latter point; that subsequently he was informed that some two weeks thereafter the depot at Cumberland Gap was destroyed by fire, and the trunk, with its contents, being still there, was burned.

He further states that the Louisville & Nashville and the Southern Railway had a common agent at Cumberland Gap, and used at that point for the transaction of their business the same station or depot. Upon these facts the question of law is: Was there a delivery of this trunk to the plaintiff in error, so as to make it liable for this loss as a common carrier?

That delivery is essential to create the liability of a party or corporation sought to be held as common carrier is beyond question. It is well settled, however, that

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this delivery can be as well constructive as actual, and many illustrations of a complete constructive delivery are found in the text-books and in the reports of many States. In the present case there was no actual delivery. Now, was there a constructive delivery, such as to make the Southern Railway liable for this loss? Even if it be true that this trunk was, at the time of the agreement made by the agent at Tazewell to forward it to Knoxville, in the depot at Cumberland Gap (and there is no evidence in the record of that fact), yet we do not see how the mere delivery of that check and its acceptance by the agent of the Southern Railway can be held as a constructive delivery to the latter road. Though it be, as was held by this court in *L., etc., R. Co. v. Weaver*, 9 Lea, 38, 42 Am. Rep., 654, that a check for baggage is, in legal effect, and answers the purpose of, a bill of lading, yet this check was issued by the Louisville & Nashville Railroad upon an undertaking to convey the trunk to Cumberland Gap. Wherever the trunk was at the time of the agreement in question, it was in the possession and under the control of that company. It may be that, upon the presentation of that check by the Southern Railway to the agent of the Louisville & Nashville Railway Company, it would have surrendered its possession. But it was not surrendered, nor does it appear affirmatively from this record that it would have been. Certainly the mere agreement between Armstrong and the agent of the Southern Railway, without the consent of the Louisville & Nashville

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Railway Company, could not work a transmutation of possession. This was essential to the maintenance of the present action; for the authorities all agree that, until the entire and exclusive custody of goods or baggage has been given to the common carrier, no responsibility rests upon him in that character. Hutchinson on Carriers, section 94; 4 Elliott on Railroads, section 1403 et seq.

We do not deem it of any importance in the settlement of this question that these two railways used the same station at Cumberland Gap and had there an agent in common. The duties of this party to his several employers were as distinct as if devolved upon two separate persons, who discharged them at two different stations or depots in that town.

If it appeared that the Southern Railway had, by an established custom or otherwise, authorized such an agreement as was made in this case, then no doubt the carrier relation would have at once attached; but there is nothing to show that such authority was given to its agent, either expressly or by implication. If bound to make good the loss of this trunk under the conditions disclosed, then this railway would have been equally bound upon such an agreement made by this agent if the check had made it deliverable to Louisville or some other point on the Louisville & Nashville Railway, hundreds of miles distant from Tazewell. Mere distance could not affect in any degree this question of liability. It could hardly be maintained that one who checked his

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trunk from the city of New York to Washington over one of the lines of the Pennsylvania System, and, without more, being at Bristol, Tennessee, delivered his check to the agent of the Southern Railway at that place, upon the agreement of the latter to see that the trunk was forwarded to Knoxville, Tennessee, where the owner was then bound, could hold that railway liable for its loss, where the failure occurred under the circumstances such as is shown in the present case.

It seems to us that, should the plaintiff in error be held liable in this case, then if, instead of delivering the check to its agent in Tazewell, it had been given by Armstrong to the agent of the transfer company in Knoxville, who accepted it with a promise to see that the trunk was forwarded, and, failing to do so, it was lost or destroyed, that company would be equally liable. Yet no one would insist that, without any authority shown upon the part of the transfer agent to make such agreement, or any proof of the fact that the trunk had ever come into the actual possession of the transfer company, it would be responsible for the loss. We are unable to understand how the mere fact that the line of the Southern Railway extended from Tazewell to Cumberland Gap can in any wise affect the question.

We think the case falls within the authority of *Stewart v. Gracey*, 93 Tenn., 314, 27 S. W., 664. There, through its agent, the firm of Stewart, Ralph & Co. had purchased from a firm in the city of Clarksville a num-

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ber of hogsheads of tobacco. The defendants, Gracey & Bro., were common carriers in that city engaged in the transfer business. The agent of Stewart, Ralph & Co. delivered to Gracey & Bro. the warehouse receipts or coupons for this tobacco, and at the same time gave them a written order on the warehouseman for the same. There were unavoidable delays experienced by Gracey & Bro. in the removal of the tobacco, during which time several of the hogsheads were destroyed by fire, and the object of the suit was to hold them liable for the loss thereby sustained, upon two grounds: First, of negligence; and, second, that as common carriers they were insurers against all losses except those occasioned by the act of God or the public enemy. In the course of the opinion, in disposing of the second ground, the court said: "It is insisted the order and coupons had been accepted by the carrier, and that by virtue of holding them they had commenced to move and had in fact moved a portion of the fifty-six hogsheads. . . . The argument is that these acts constituted a constructive delivery, and the tobacco thereby passed under the control and custody of the carrier for removal, and that the carrier's liability at once attached. We are unable to concur in this contention. The contract of carriage involves a bailment, and ordinarily there must be an actual delivery of the goods to the carrier. A contract with a common carrier for the transportation of property being one of bailment, it is necessary, in order to

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charge him for its loss, that it be delivered to and accepted by him for that purpose. But such acceptance may be actual or constructive. For instance, if the property be deposited at a designated station, in accordance with a conventional arrangement between the parties in respect to the mode of delivery, or if it be deposited with a third person who is authorized by the carrier to execute a bill of lading in the name of the carrier, then such mode of delivery is as complete as if the property had been actually deposited with the carrier. . . . But in the case at bar the tobacco was not deposited in the custody of an agent of the shipper and constructively in the possession of the shipper himself. The carrier did not execute a bill of lading or receipt for the property, nor did he in any way acknowledge that the property was in his custody. The carrier in this place simply had an order from the shipper to enable him to get possession of the tobacco. If the warehouseman had refused to recognize the order, and had converted the property to his own use, the carrier would not be liable simply for the reason that he had never secured possession of the goods."

If it be true that with the warehouse receipts or coupons in their hands, and an order from the owner for a delivery of the tobacco, there was no constructive delivery, so as to impose on Gracey & Bro. the liability of a common carrier, then we think the principle announced applies in this case, where an agent without any real or apparent authority, so far as we can see, from

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his principal, accepts a check issued by another railroad for a trunk then at a point twelve or fourteen miles distant and in the custody of the railroad, and agrees to forward the trunk to his place of destination. That this agent may be responsible for his failure to do what he thus undertook is possibly true; but this is beside the question in controversy.

The judgment of the court below is reversed; and, this having been delivered without the intervention of a jury, the suit is dismissed.

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ACME BOX COMPANY v. BASCOM GREGORY, by next friend,
and

ACME BOX COMPANY v. J. L. GREGORY.

(*Knoxville*. September Term, 1907.)

1. **MASTER AND SERVANT.** Safe place to work; servant assumes risk of a known dangerous place or hole. when.

It is the duty of the master to furnish the servant with a safe place to work; but where the servant has full knowledge of the danger, and continues to work in the dangerous place, he assumes the risk, as where the plaintiff knowing the exposed condition of a hole in the floor, continues to work there, he assumes the risk. (*Post*, p. 541.)

Cases cited and approved: Railroad v. Smith, 9 Lea, 685; Brewer v. Coal Co., 97 Tenn., 615; Brown v. Electric Co., 101 Tenn., 252; Corbett v. Smith, 101 Tenn., 368; Iron Co. v. Pace, 101 Tenn., 476, 486-489; Ferguson v. Cotton Mills, 106 Tenn., 236.

2. **SAME.** Same. Master's duty to inspect premises; no presumption of negligence from failure for a short time.

It is the duty of the master to exercise reasonable care to inspect the premises and the place where his servants are engaged, but no presumption of negligence will arise from his failure to inspect during the short period of four and one-half hours after a defect suddenly appeared by the patch, covering a hole in the floor, being torn off, and leaving the hole open and unprotected, when no indication of anything wrong was communicated to him. (*Post*, pp. 541, 542.)

3. **NEW TRIALS.** Overruled motion for a new trial may be embraced in bill of exceptions for review on appeal, when.

A motion for a new trial overruled and refused may be brought to the supreme court in the bill of exceptions, where a written

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motion was filed stating the grounds on which a new trial was sought, where it appears on the minute book that such a motion was made, and what disposition was made of it, with a reference made to the written motion so filed, and notation of the filing entered on the rule docket. (*Post*, pp. 542-547.)

Acts cited and construed: Acts 1875, ch. 106.

Cases cited and distinguished: Railroad v. Egerton, 98 Tenn., 541, 542, 543; Railroad v. Johnson, 114 Tenn., 632.

4 PEREMPTORY INSTRUCTIONS. For verdict for defendant where plaintiff as employee assumed a known risk.

Peremptory instructions for a verdict in favor of the defendant should be given, where the plaintiff as employee with full knowledge of the danger continues to work in the dangerous place; and the defendant as employer is guilty of no negligence. (*Post*, pp. 539-542.)

5. SAME. Same. Dismissal of suit upon reversal for failure to give.

Where a judgment in favor of the plaintiff is reversed upon the ground that the circuit judge erroneously refused to give peremptory instructions for a verdict in favor of the defendant, the supreme court will dismiss the suit. (*Post*, pp. 539-542, 547.)

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County.—M. M. ALLISON, Judge.

SMITH & CARSWELL and JAMES H. ANDERSON, for Box Company.

SHEPHERD & FRIERSON, for Bascom.

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MR. JUSTICE NEIL delivered the opinion of the Court.

The first suit was brought by Bascom Gregory, a minor, to recover for personal injuries alleged to have been inflicted upon him by the negligence of the plaintiff in error, and the second was brought by his father to recover for loss of services of the son on account of the same injury. Both cases were tried at the same time, resulting in a verdict of \$2,250 in favor of Bascom Gregory and \$3,000 in favor of J. L. Gregory. From these judgments the plaintiff in error, after his motion for a new trial was overruled, appealed to this court, and has here assigned errors.

The errors assigned are: First, there is no evidence to sustain the verdict; second, the court erred in failing to sustain a motion for peremptory instructions, offered by the plaintiff in error, at the close of the testimony of the plaintiff below, and also at the close of all the evidence; and, thirdly, that the verdict was so excessive as to indicate passion, prejudice, or corruption on the part of the jury.

We shall consider the first and second assignments together.

The defendant in error Bascom Gregory was a boy seventeen years old, and appears from his testimony to be a young man of average intelligence. He was employed by the plaintiff in error in the fall of 1905 to saw scraps of lumber into certain forms according to directions. The saw on which he was working was located on a table in front of him. Near by, to his rear, there

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was another saw of the same kind, worked by another boy. The two tables were distant from four to eight feet, as variously estimated by the witnesses. At the edge of the saw table just back of the defendant in error, there was a hole about sixteen inches square, which had been in the floor for many years, but up to the morning of the accident it was covered with pieces of plank nailed over it. Over this patch in the floor there was a box which was used for scraps falling from the saw of the boy just behind him. This box would get full and have to be emptied about every fifteen minutes, and it would require about ten minutes to take it out and empty it and get back with it. During this interval the patch in the floor would be exposed. The defendant in error had been in the employ of the company about a week, and his work went along without incident until the morning of the accident. On that morning it was discovered that the patch had come off, or been torn off—at least, was off—leaving the hole exposed, and nothing to protect it except the box, when the latter was resting over it. This situation was disclosed at 7 o'clock in the morning, and the defendant in error was hurt about 11:30. He was fully aware of the existence of the hole, and of the fact that it was dangerous when exposed, and that it was exposed, and would be exposed, say twice in every half hour, during the day. It was a part of the defendant in error's duty to go some distance from the saw that he was working on, and fill his arms with scraps of lumber, and go back to his saw, and

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place them on the table for use in sawing. On one such occasion, during the day, about 11:30 o'clock, he went out to get the scraps, and came back with his arms full, and placed them on the table at a convenient distance to pick them up as he would need them in sawing. As he placed the armful of scraps on the table he stepped back, and, for the moment forgetting the existence of the hole, stepped in it, and this threw his right arm over the saw on the table back of him and lacerated it so much that it had to be amputated. There is no testimony that the defendant in error, or any one else, informed the master that the patch had been torn off, and the hole exposed; nor is there testimony of the exposure of this hole.

The foregoing are the undisputed facts. The question is whether they make out a case of liability against the master.

We think they do not. It is the duty of the master, of course, to furnish the servant with a safe place to work; but where the servant has full knowledge of the danger, and continues to work in the dangerous place, he is held to assume the risk. *Iron Co. v. Pace*, 101 Tenn., 476, 486—489, 48 S. W., 232; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn., 236, 61 S. W., 53; *Brown v. Electric Co.*, 101 Tenn., 252, 47 S. W., 415, 70 Am. St. Rep., 666; *Corbett v. Smith & Co.*, 101 Tenn., 368, 47 S. W., 694; *Brewer v. Tennessee, etc., Coal Co.*, 97 Tenn., 615, 37 S. W., 549; *Railroad v. Smith*, 9 Lea, 685. In the present case, if we assume that the master was in fault in not discovering the existence of the hole in question

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in so short a time, still the servant would be precluded from recovery, because the defect in the floor was perfectly obvious, and the risk or danger of it was also perfectly apparent to the servant. But we do not think that the facts show any negligence on the part of the master, since the defect was one that suddenly appeared, and it is not shown that the master had any knowledge of it. It is, of course, the duty of the master to exercise reasonable care to inspect the premises and the place where his servants are engaged. But we do not think any presumption of negligence could arise from his failure to inspect during the 4½ hours covering the period of the existence of the hole unprotected by the patch, when no indication of anything wrong was communicated to him by those under whose immediate observation the defect was; that is, the defendant in error and his fellow servants.

On the grounds stated, we think the peremptory instruction should have been given.

However, it is insisted in behalf of the defendant in error that the plaintiff in error cannot make the question above disposed of in this court, because his motion for a new trial in the court below was not entered at large upon the minutes of the court, but only in the bill of exceptions. In support of the proposition we are referred to *Railroad v. Egerton*, 98 Tenn., 541, 41 S. W., 1035, and *Railroad v. Johnson*, 114 Tenn., 632, 88 S. W., 169.

Before referring to these cases, it is proper that we

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should state the exact facts concerning the entries in the present cases. In each case, the following entry appears upon the minutes :

“Defendant’s motion for a new trial, heretofore filed in writing in this case, was heard by the court and overruled, to which action of the court the defendant then and there excepted, and prayed an appeal to the next term of the supreme court to be held at Knoxville, which was granted to defendant on giving bond and security for costs and damages incident to the appeal.”

In each case there is an entry on the rule docket showing that a motion for a new trial had been filed, and another and later entry on the same docket showing that the motion had been overruled. In the bill of exceptions the motion for a new trial was copied *in extenso*. It likewise shows that it had been marked “Filed” by the clerk on the same day, as shown by the entry on the rule docket.

There is no order of the court below, contained in the present record, showing that that court has a rule requiring motions for new trial to be presented in writing, showing the grounds of the motion ; but, in the view we take of the statute below referred to, this is immaterial.

As authority for incorporating the motion for a new trial in the bill of exceptions, we are referred by counsel for plaintiff in error to chapter 106, p. 189, of the Acts of 1875, which (omitting the enacting clause) reads as follows :

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"That where a motion for a new trial shall be *granted or refused*, either party may except to the decision of the court and may *reduce to writing the reasons offered for said new trial, together with the substance of the evidence in the case*, and also the decision of the court on said motion; and *it shall be the duty of the judge, before whom such motion is made, to allow and sign the same; and such bill of exceptions shall be a part of the record in the case*, and it shall be lawful for the appellant in such case to have assigned for error that the judge in the court below improperly granted or refused a new trial therein, and the supreme court shall have power to grant new trials, or to correct any errors of the circuit court, in granting or refusing the same."

The italics are not in the act, but we have made the italics for the purpose of more convenient reference.

It is insisted for plaintiff in error that the language italicized, taken in connection with the other language appearing in the act, requires that the grounds for a new trial shall be incorporated in the bill of exceptions.

It is insisted that this act applies, not only to bills of exceptions made up in cases where a new trial has been granted and the party against whom it is granted desires to make a record, in order that the propriety of the judge's action may be subsequently tested in the supreme court, after there shall have been a judgment in the court below against which that court refused to grant a new trial, but that it applies to all motions for new trial; that is to say, it is insisted for the plaintiff in

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error that, when a motion for a new trial is either granted or refused, the party who considers himself aggrieved by the action of the court, either granting or refusing the motion, has the right to take a bill of exceptions in the manner provided therein, and to incorporate in such bill of exceptions the grounds of the motion; that this applies just as well in cases where the judge of a lower court refuses to grant a new trial, and an appeal is taken from that action to the supreme court, as to cases where he grants the new trial against a verdict which the winning party on that trial seeks to maintain.

It is insisted that this statute was not referred to or considered by the court in the case of *Railroad v. Eger-ton*, supra. In that case the court said:

"The defendant appealed in error; its motion for a new trial and in arrest of judgment being overruled, as it avers and as appears in the bill of exceptions. It does not appear, however, on the minutes of the court that such motions were made, though the bill of exceptions recites the fact that they were made. We cannot, therefore, hold that any such motions were made at all. If made, it was necessary that they should have been entered on the minutes of the court, and even though they had been in fact made, and the bill of exceptions presented to us be treated as showing that they were made, it is still indispensable that they should appear, with the action of the court thereon, on the minutes. It is not the office of a bill of exceptions to pre-

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serve minute entries, and take the place of the minutes of the court." 98 Tenn., 542, 543, 41 S. W., 1035.

It does not appear in the case from which we have just quoted that there was any entry at all on the minutes. In the cases before the court there were entries on the minute book, showing that a motion for a new trial had been made and overruled, and the complete motion was filed in the office of the clerk, and notation made on the rule docket.

We have here a clear reference in the minutes to a designated paper where the exact language referred to therein could be found. We think this was fairly within the rule laid down in the *Egerton Case*.

Moreover, we are of the opinion that the statute above quoted not only requires that a motion for a new trial shall be filed, stating the grounds on which it is sought to question the action of the court below, but that this motion may be brought up to this court in the bill of exceptions. It should, however, appear upon the minute book that such a motion has been made, and the disposition of it, and there should be at least a reference to the motion on file, such as was made in the cases now before the court. The better practice would be, also, as laid down in *Railroad v. Egerton*, to set forth the whole motion on the minutes of the court.

The case of *Railroad v. Johnson* is not at all adverse to the present view. In that case, indeed, the court, in an opinion by Mr. Justice Shields, enforces by reason and authority the proposition that this court, in cases

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coming from the lower courts of law, can act only upon such matters as were passed on by such lower courts, and that there should be a motion for a new trial, pointing out specifically the objections to the action of the lower court, and that the case should be tried here upon the propriety of the ruling of that court in respect of the matters so complained of. In other words, the opinion in the case of *Railroad v. Johnson* arrives at the same proposition in substance by a course of reasoning and the use of general authorities which we here hold is likewise acquired by the act of 1875. The opinion in that case refers merely in passing to *Railroad v. Egerton* on the point that the motion must be reduced to writing and entered upon the minutes of the court. This remark is merely incidental in the opinion referred to, and the court did not have in mind the statute above copied. We do not think that either of the cases cited was intended to establish a rule different from that laid down in the statute, or can be treated as qualifying that rule.

On the grounds stated above, we are of the opinion that the judgment of the court below should be reversed, and the suit dismissed.

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ELGIN CITY BANKING COMPANY v. JEFF HALL *et al.*

(Knoxville. September Term, 1907.)

1. **BILLS AND NOTES.** Procured by fraud are not enforceable as between the original parties.

Where the agent of the owner of a horse in selling him represented to five of the buyers that three other named persons with whom he had secretly arranged to pay two of them a consideration and to release another from the payment of the purchase price, for the use of their names as buyers, were to become equal partners in the purchase of the horse, the notes executed by the individuals, thus imposed upon, for the price of the horse were procured by fraud, and are not enforceable as between the original parties. (*Post*, pp. 551-557, 566.)

2. **SAME.** Indorsement "without recourse" does not impair their negotiability.

The indorsement of a negotiable instrument "without recourse" is not sufficient to put the purchaser upon notice, and it does not impair the negotiable character of the instrument. (*Post*, pp. 558, 559.)

Acts cited and construed: Acts 1899, ch. 94, sec. 38.

3. **SAME.** Indorsement in blank is not nullified by an indorsement of guaranty following it.

The blank indorsement of a negotiable instrument is not nullified by another indorsement following after it and guaranteeing the payment thereof with a greater rate of interest, and the costs of collection, and waiving demand of payment and notice of nonpayment. Whether such indorsement of guaranty without the prior blank indorsement would destroy the negotiability of the instrument is reserved as unnecessary to be determined. (*Post*, pp. 559, 560.)

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Cases cited and approved: Banking Co. v. Zelch, 57 Minn., 487; Cover v. Myers, 75 Md., 406; Trust Co. v. Railroad, 75 Fed., 433.

4. SAME. Remedy against guarantor in an absolute guaranty.

Where the guaranty of a note is absolute no demand or exhaustion of the maker is required, nor is any notice of acceptance or default required. (*Post*, pp. 562, 563.)

5. SAME. Same. Instance of an absolute guaranty.

Whether the guaranty of a note stipulates that the maker will pay, or whether it stipulates that the guarantor will pay, the underaking is absolute whether the maker is solvent or not, and the guarantor must pay the amount or see that it is paid. It is not the case of a guaranty of the solvency or collectibility, which requires previous demand and suit. (*Post*, p. 563.)

Case cited and approved: Klein v. Kern, 94 Tenn., 34, 37. .

6. SAME. Bank giving indorser credit on his account for proceeds of note discounted is not a purchaser for value.

Where a bank simply discounts a note and credits the amount thereof on the indorser's account, without paying to him any value for it, it does not *prima facie* become a *bona fide* purchase for value, since the proceeds of the discount may be credited to the bank by making a change of entry on its books. (*Post*, p. 564.)

Case cited and approved: Warman v. Bank, 185 Ill., 60.

7. SAME. Purchaser is holder for value and in due course of trade, when.

A purchaser of commercial paper is a holder for value and in due course of trade, when he has given for the note his money, goods, or credit, at the time of receiving it, or has on account of it sustained some loss or incurred some liability. (*Post*, pp. 560-562, 565.)

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Acts cited and construed: Acts 1899, ch. 94, secs. 25, 26, 52, 55, 56, 57, and 59.

Cases cited and approved: *Nichol v. Bate*, 10 Yerg., 429; *Kimbro v. Lytle*, 10 Yerg., 417; *Bank v. Johnston*, 105 Tenn., 521.

8. **SAME.** Bank purchasing note and obtaining credit for seller in another solvent bank is holder for value.

A bank discounting a note and obtaining credit in favor of the indorser in another solvent bank for the amount of the discounted paper is a holder for value. (*Post*, pp. 564, 565.)

9. **SAME.** Same. Testimony must show in what way credit was given.

Testimony that the purchaser paid for the note the full amount thereof by giving the seller credit for the amount at named bank, without showing how the credit was given, or that it was ever used, does not show the purchaser to be a holder for value, since the court cannot determine whether or not the credit was real and substantial. (*Post*, pp. 565, 566.)

10. **SAME.** Burden rests on purchaser to show that he was a holder for value, when.

In an action on a note by the purchaser thereof against the makers, defended on the grounds that it was procured by the fraud of the payee, as shown in the first headnote, and that the purchaser was not an innocent purchaser for value, the burden of proof rests upon the complainant to show that he was a holder for value. (*Post*, p. 566.)

FROM BRADLEY.

Appeal from the Chancery Court of Bradley County.—
T. M. McCONNELL, Chancellor.

WHEELER & TRIMBLE, for complainant.

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MAYFIELD & MAYFIELD, for defendants.

MR. JUSTICE MCALISTER delivered the opinion of the court.

This bill was filed by the Elgin City Banking Company, a corporation chartered under the laws of the State of Illinois, and having its *situs* and principal place of business at Elgin, in said State, against the defendants, who are all residents of Bradley county, Tennessee, for the collection of two promissory notes, together with the accrued interest. Complainant claims to be an innocent holder of said notes, and purchased them before maturity, in due course of trade, without notice of any outstanding equities against them. A copy of one of said notes, together with the indorsements thereon, is in the words and figures following, to wit:

"400.00

Cleveland, Tenn., Oct. 1st, 1903.

"On or before the first day of September, 1905, for value received, we jointly and severally promise to pay to the order of Dunham, Fletcher & Coleman, of Wayne, Ill., four hundred dollars (\$400.00), payable at the Cleveland National Bank, with interest at five per cent. per annum, payable annually from date, until paid.

"JEFF HALL.

"C. T. CARROLL, JR.

"L. L. CALLAWAY.

"L. P. SULLIVAN.

"T. J. MCKAMY.

"EDWARD H. THURSTON."

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"Pay to the order of W. S., J. B. & B. Dunham, without recourse to us.

"DUNHAM, FLETCHER & COLEMAN."

"W. S., J. B. & B. Dunham."

"For value received, we hereby guarantee, the payment of the within note at maturity, or at any time thereafter, with interest at five and one-half per cent. per annum until paid, and we agree to pay all the costs and expenses paid or incurred in collecting the same, hereby waiving demand of payment and notice of non-payment.

"W. S., J. B. & B. DUNHAM."

Defendants answered the bill, in which they admitted the execution of the notes, but denied that complainant is an innocent purchaser of said notes, for value, and in due course of trade. It is averred that said notes were procured by fraud and misrepresentation on the part of Dunham, Fletcher & Coleman, the payees; and as a further defense it is averred that the consideration for said notes has wholly failed.

The more specific averments of the answer are that the notes in suit represented in part the purchase price (\$1,600) of a certain horse; that at the time of said purchase the payees, Dunham, Fletcher & Coleman, delivered to respondents a written statement or guaranty of the soundness of said animal and that he possessed all the qualities represented by the seller, but on delivery of the horse it was soon ascertained that he was a stump

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sucker and did not in any respect possess the qualities guaranteed by said seller. When said facts were communicated to the seller, said firm agreed to receive back the horse, and agreed with two of the purchasers to ship another horse to Cleveland in place of the first, which was accordingly done. It is then averred that the second horse was of a notoriously diseased breed of horses, and was not only thus diseased, but was not up in other respects and qualities to the warranty of the seller, all of which facts were fraudulently concealed from the purchasers. It is then averred that the second horse so shipped to Cleveland died within about two months after his arrival, as a result of his diseased condition at the time he was shipped; and respondents aver that said sellers, as horse dealers, must have known of the diseased condition of this horse, but fraudulently concealed the same from respondents.

It is further averred that the agent of the payee of said notes, at the time the defendants agreed to purchase the horse, made secret and fraudulent contracts with certain of said purchasers, in whose judgment as horsemen defendants had confidence, whereby said parties were induced to represent themselves as willing to enter into said purchase as equal partners, and pretended to join with defendants as purchasers, and also pretended to pay or become liable for said sum of \$200 each for a one-eighth interest in said horse, for the fraudulent purpose of inducing defendants to enter into said contract; whereas, in fact, neither of the parties to said

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secret contract contributed said sum of \$200, but by the agreement with said seller were either paid large sums in cash to wit, from \$50 to \$100, or were given a one-eighth interest free of charge, to have them passed as equal partners or purchasers, and induce defendants to enter into said contract and become liable for said purchase money.

It is averred that the purchase by each of the said eight alleged purchasers was a material part of the consideration for said purchase by all the other purchasers. Defendants, therefore, aver that, because of the fraud, misrepresentations, and concealments on the part of the payees in procuring said contract and notes, and because of said failure of consideration they are not liable to complainants for the amount of said notes or other sum.

It appears that the notes in question were indorsed by the payees, Dunham, Fletcher & Coleman, to another firm, of which W. S. Dunham was a member, and by that firm transferred before maturity to complainant bank. It is claimed by the complainant that it had no notice of any equities existing against the notes. The complainant bank claims to have purchased the notes by placing the amount paid for them to the credit of W. S., J. B. & B. Dunham (the second indorsers, for whom the notes were discounted) in the First National Bank of Elgin, Ill., a different bank from complainant, which is the Elgin City Banking Company, as already stated.

Proof was taken and on the hearing the chancellor

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was of the opinion that the complainant did not give value for the notes; he holding that the defenses alleged were good against the original payee and therefore good also against the complainant. The chancellor was of opinion that the complainant was not an innocent holder of the paper and that the defense set up in the answer had been established by the proof, and he accordingly dismissed the complainant's bill. The complainant appealed, and has assigned errors.

The first inquiry naturally arising is whether there was fraud in the original inception of this contract, for which the notes in question were executed in part fulfillment.

It is shown on the record that one Campbell, the agent of the payees, Dunham, Fletcher & Coleman, brought the first horse in question to Cleveland, and, having failed to sell him, proposed to six of the defendants to purchase the horse for \$1,600, as equal partners. It is shown by the proof that said agent stated to the defendant E. H. Thurston that several others would join in the purchase if Thurston would become interested, and proposed that Thurston should hold himself out as a purchaser and affect to pay said sum of \$200 with the others, but he should pay only \$100, and the remaining \$100 would be repaid to him; and it is shown that Thurston, under this secret contract, did thereafter pretend to join with the others as an equal partner in said purchase. It is also shown that said seller approached one M. L. Beard, of Cleveland, an old and experienced

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dealer in horses, and on whose judgment the other purchasers relied, and proposed that said Beard should also become a colorable purchaser, and should receive a one-eighth interest in said horse gratis if he would profess to join in said purchase; and under this agreement, Beard did thereafter pretend to be a bona fide purchaser, and permitted the seller to so represent him. The seller not only represented Beard as one of the purchasers, but some of the other purchasers were referred to him for his judgment as to the merits of the horse.

It is also shown that said agent agreed with J. T. Hall, another of said purchasers, to pay said Hall the sum of \$50 for his services in inducing the others to join in said purchase. It is shown that none of the other purchasers knew or suspected these secret and fraudulent contracts had been made, but supposed that all the others were entering into the purchase on equal terms of partnership. It was represented to the five purchasers who received no secret consideration that seven others had agreed to join, and that it was only necessary that he agree to join to complete the purchase. It is further shown that when the eight purchasers met with said seller to complete the purchase and sign the notes for the purchase money, Thurston and Hall, at the request of the seller, signed the notes with the others, and the seller then secretly paid to them in cash the sums of \$100 and \$50 respectively, according to their secret arrangement. The seller also desired said Beard to sign said note and receive \$200 in cash; but Beard ob-

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jected to this, and it was thereupon announced to the others that Beard was paying his part of the purchase money to said seller in cash, but in fact nothing was paid by him. It is shown that one of said purchasers, G. W. Day, paid the seller the sum of \$200 in cash, and this, with the \$200 alleged to have been paid by said Beard, left a balance of \$1,200, and for this sum the six defendants executed three notes, each for \$400, due, respectively, on or before September 1, 1905, 1906, and 1907, with interest at 5 per cent., payable annually. It is also shown by the proof that, while the agent made many representations and warranties as to the soundness and fine breeding qualities of the animal, he carefully kept the horse in a locked box stall before the sale, where he could not be seen, except when taken out by the seller for inspection; but within a few days after the purchase it was discovered that the animal was unsound. When the seller was notified of this, he took back the horse and sent another in exchange. This new contract was negotiated by Thurston and Hall, two of the alleged purchasers, who had been secretly paid to enter into the original contract. The second horse, as already seen, died about two months after he was received.

We think, upon the facts shown in the evidence, that this contract and these notes were not enforceable against the original makers, on account of the fraud and misrepresentation practiced by the agent of the payees, Dunham, Fletcher & Coleman.

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The question remains whether the complainants were innocent purchasers of said note for value, before maturity, in due course of trade, without notice of any of the infirmities in said notes.

As already seen, said notes were first indorsed "without recourse" by Dunham, Fletcher & Coleman, the payees, to W. S., J. B. & B. Dunham, and said notes were then delivered to complainant bank by said W. S., J. B. & B. Dunham under a written guaranty on the back of the notes, by which said firm guaranteed the payment of said note with interest at five and one-half per cent. per annum, together with all the costs and expenses of collection, and also waived demand and notice of nonpayment.

It is suggested that the indorsement "without recourse" was sufficient to put the purchaser upon notice, and destroyed the negotiability of the instrument; but we think it is well settled that an indorsement without recourse is not sufficient to put the purchaser upon notice. 2 Randolph, Commercial Paper, section 1008; 7 Cyc., 954, and numerous cases cited.

Moreover, the matter is set at rest by our negotiable instrument law (Acts 1899, p. 148, c. 94 section 38), wherein it is provided that "such an indorsement does not impair the negotiable character of the instrument."

Again, it is insisted that complainant bank holds another indorsement or guaranty by which the guarantors agree to guarantee payment of the note at a different and higher rate of interest than the note bears, and

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also guarantee payment of all expenses of collection, whereas the notes themselves contained no such provision.

It has been observed that the notes bear interest at five per cent., while the guarantors agreed to pay interest at five and one-half per cent. It is argued that this is a new, independent, and different contract, and not merely a transfer of the notes. It is conceded that many of the authorities hold that a mere guaranty of a note will constitute the purchaser an indorsee, within the rule protecting an innocent holder; but it is insisted that this rule cannot apply to a guaranty changing the rate of interest and also agreeing to pay expenses of collection. It is argued that, if this can be done without destroying the negotiability of the paper, then each indorsee can, of course, change the rate of interest or the amount of the note, and each be liable for a different amount.

It is unnecessary to decide this question, since it appears that the notes were indorsed in blank by W. S., J. B. & B. Dunham, and the guaranty did not, of course nullify their prior blank indorsement.

In *Elgin City Banking Co. v. Zelch*, 57 Minn., 487, 59 N. W., 544, the indorsements were:

"Pay Elgin City Banking Co. D. Dunham."

"Payment guaranteed. D. Dunham."

The court said:

"Whether these indorsements be construed as constituting a single contract, or two separate and distinct

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contracts, we are clear that they constitute indorsements in the commercial sense, and that the transferee is an indorsee, and entitled to protection as such under the law merchant. The fact that Dunham enlarged his responsibility beyond that of an indorser by guaranteeing payment did not change or affect the character of his indorsement."

In *Cover v. Myers*, 75 Md., 406, 23 Atl., 850, 32 Am. St. Rep., 394, it is held that a guaranty added to an indorsement is not notice of defenses. *Louisville Trust Co. v. L., N. A. & C. R. Co.*, 75 Fed., 433, '22 C. C. A., 378.

The determinative question presented on the record is whether the complainant bank is a holder for value. Our negotiable instrument law (section 25) provides:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value and is deemed such whether the instrument is payable on demand, or at a future time."

"Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions: .

"(1) That it is complete and regular upon its face.

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

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"(3) That he took it in good faith and for value.

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it."

"Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act, when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

"Sec. 56. To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

"Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses, available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"Sec. 59. Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that

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he, or some person, under whom he claims acquired the title as a holder in due course."

While we find some facts and circumstances in the record tending to show that complainants were put on inquiry as to defenses against this note, we cannot say that complainant "had actual knowledge of the infirmity or defect or knowledge of such facts that its action in taking the instrument amounted to bad faith."

It is matter for observation that at the time of purchasing this paper the officials of the complainant bank made no inquiry in respect of the makers or as to the consideration of the notes, although it is admitted they knew nothing as to the commercial standing or solvency of the makers.

Again, it appears that in enforcing the collection of the notes complainant has ignored the guarantors and is only suing the original makers. This is worthy of comment, since the guaranty was for the payment of all expenses of collection and additional interest. It appears the guarantors are solvent and reside within seven miles of complainant's place of business, and yet, passing them, complainant sent this paper to Cleveland, Tennessee, for collection, thereby seeking a lower rate of interest and incurring attorney's fees in the prosecution of the suit. There was no obstacle in the way of a primary suit against the guarantors on this form of guaranty. It is well settled in Tennessee that, when the guaranty is absolute, no demand or exhaustion of the maker is required; nor is any notice required of the

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acceptance or default. It does not matter whether the guaranty stipulates that the maker will pay, or that the guarantor will pay, nor whether the maker is solvent or not. In either event, the undertaking is absolute, and the guarantor may pay the amount, or see that it is paid. This is not the case of a guaranty of solvency or collectibility, which requires previous demand and suit. *Klein v. Kern*, 94 Tenn., 34, 28 S. W., 295, and authorities there cited.

The only explanation of this unbusinesslike procedure on the part of complainant bank is that the firm of guarantors did a valuable business with the bank and that complainant would do anything to protect them.

The main proposition presented by counsel for defendants is that complainant is not a holder of said paper for value within the meaning of our negotiable instrument law. It is said it is not shown that complainant has ever paid anything in money, or the equivalent, for said paper; but the cashier of the bank merely testifies that he gave said firm "credit for the amount at the First National Bank of Elgin." It is said it is not shown that said credit was ever used by said indorsers, W. S., J. B. & B. Dunham. The entire testimony on this subject is found in the deposition of A. C. Hawkins, cashier of the complainant, Elgin City Banking Company. He tells of the purchase of said notes, together with sundry other notes, in one lot, from W. S. Dunham, of the firm of W. S., J. B. & B. Dunham, paying therefor the full amount of said notes, with accrued in-

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terest to date of purchase, at said bank, in the usual course of business. This was the testimony of the witness on his direct examination, from which it appears that a *prima facie* case of a holder for value is made out; but, on cross-examination of the witness at a later date, he was asked, "Q. 4. Do you recall how you paid for them [referring to the notes]?" and he answered, "I gave them credit for the amount at the First National Bank of Elgin on the 18th day of July, 1904." It will be observed that the alleged credit was not given in the bank which purchased the notes (the complainant, Elgin City Banking Company), but at a different bank, namely, the First National Bank of Elgin, Ill.

The law seems to be settled that, when a bank simply discounts a note and credits the amount thereof on the indorser's account, without paying to him any value for it, it is not enough to constitute such bank a *prima facie* purchaser for value of the note. Selover, Neg. Inst. Laws, p. 217; 2 Amer. & Eng. Ency. of Law, 391, 392; *Warman v. First Nat. Bank*, 185 Ill., 60, 57 N. E., 6, 49 L. R. A., 412.

The reason is that the proceeds of the discount may be credited to the bank by making a change of entries on its own books. It is said, however, that this rule of law has no application where the credit to the seller of negotiable paper is given by the purchaser, not on its own books, but in a different bank. It is said the presumption must be, in such case, that the purchaser has paid money, surrendered securities, released an obligation, or

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itself assumed an obligation in the other bank, in order to secure this credit. The record fails to show why payment of the notes was made in this manner, nor the precise nature of the transaction by which the complainant bank secured credit to the seller in the First National Bank of Elgin for the amount of these discounted notes.

It is well settled that a purchaser of commercial paper is a holder for value and in due course of trade, when he "has given for the note his money, goods, or credit, at the time of receiving it, or has on account of it sustained some loss or incurred some liability." *Nichol v. Bate*, 10 Yerg., 429; *Kimbrow v. Lytle*, 10 Yerg., 417, 31 Am. Dec., 585; *Bank v. Johnston*, 105 Tenn., 521, 59 S. W., 131.

As already seen, by section 25 of our negotiable instrument law (Acts of 1899) it is provided: "Value is any consideration sufficient to support a simple contract." There is no trouble, therefore, in holding that, if the complainant bank had obtained credit in favor of the seller in a solvent bank for the amount of the discounted paper, that would be a sufficient consideration to constitute the purchaser a holder for value.

The difficulty presented arises out of the indefiniteness of the testimony. The witness was not asked by counsel on either side for an explanation of his statement, "I gave them credit for the amount at the First National Bank at Elgin." It does not appear from the record that this credit was ever used by W. S., J. B. & B. Dunham. It does not appear how the credit was given,

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and the court cannot determine, from the unexplained statement of the witness, whether or not the credit was real and substantial. The burden of proof is on complainant to show, on these facts, that it was a holder for value.

The fraud that vitiated the original transaction was the conduct of the agent, Campbell, in representing to five of the purchasers that Beard, Hall, and Thurston had become equal partners in the purchase of the horse, when this agent had secretly arranged with these three parties to pay them a consideration to allow the use of their names as purchasers and to release them from the payment of their quota of the purchase money.

Affirmed.

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W. A. CROSS v. R. M. KEATHLEY.

(*Knorrville*. September Term, 1907)

1. **ELECTIONS.** Distinguishing marks rendering ballots void under uniform ballot law.

Ballots containing, in addition to the matter prescribed by the uniform ballot law (Acts 1891, ch. 21), certain dotted lines and solid black lines, and before the name of each office to be filled the word "for," and after the words "justice of the peace" the words "vote for two," and after the words "school directors" the words "vote for three," contain distinguishing marks, signs or insignia not authorized, but prohibited by, the statute, which render the ballots void.

Acts cited and construed: Acts 1891, ch. 21.

Numerous cases in other States cited and approved in the opinion of the court, on pages 577-581.

2. **SAME.** Ballots are not invalidated by being clipped after they were voted and thus reduced below the prescribed size.

Ballots of the size required and prescribed by the uniform ballot law (Acts 1891, ch. 21, as amended by Acts 1893, ch. 101), when they were voted, cannot be invalidated by being clipped after they were voted, nor should they be rejected because they were clipped after they were voted. (*Post*, pp. 571, 575.)

Acts cited and construed: Acts 1891, ch. 21; Acts 1893, ch. 101.

FROM SCOTT.

Appeal from the Circuit Court of Scott County.—
G. MC. HENDERSON, Judge.

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JAMES F. BAKER and TEMPLETON & TEMPLETON, for Cross.

E. G. FOSTER, D. JEFFERS, WILLIAM YORK, and JAMES A. FOWLER, for Keathley.

MR. JUSTICE NEIL delivered the opinion of the Court.

This case involves a contested election for the office of register of Scott county. The original petition was filed by W. A. Cross in the county court of Scott county, on the 7th day of August, 1906. After alleging that the petitioner was qualified to hold the office of register of Scott county, and that he was a candidate for this office, at the August election, 1906, and that his opponent was R. M. Keathley, it was alleged, in substance, that there were cast in the election 2,016 votes, of which the petitioner received 1,012, while the contestee Keathley received only 1,003, leaving the petitioner a majority of nine votes, but the election commissioners wrongfully refused to count the returns from the Eleventh district, from which the petitioner received thirty-three votes, while the contestee received only sixteen and that by rejecting these returns the contestee was declared to have a majority of the votes cast, and the certificate of election was by the commissioners of election issued to him.

In August, 1906, the contestee filed his answer, in which he admitted that the election commissioners refused to count the returns from the Eleventh district,

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but denied that their conduct in so doing was illegal and improper, and insisted that these votes were rightly rejected and should not now be counted. The contestee further alleged that 361 ballots were cast for petitioner, Cross, which were illegal and should not have been counted by the election commissioners and should now be thrown out, because upon each of these ballots before the name of each office there was printed the word "for," and there was also printed upon each of them, and extending more than three-fourths of the way across the ballot, three or more dotted lines, and there was also printed, extending from one-third to one-half the way across the ballot, three or more heavy black lines or marks. It was averred that these marks, and the placing of the word "for" in the manner just related, were in violation of the uniform ballot law.

It was further alleged that 156 ballots were cast and counted for petitioner, Cross, which were illegal, and should have been rejected, and should now be excluded, because these ballots had, likewise, printed before the name of each office the word "for," and because there were printed upon each of said ballots, and extending more than three-fourths of the way across, eight or more broken lines or marks, and there were also printed upon said ballots, and extending from one-third to one-half the way across, three or more heavy black lines or marks, and after the words "justice of the peace" there were printed the words "vote for two," and after the

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words "school directors" there were printed the words "vote for three."

The number of each of the ballots cast at each precinct, except for the First and Twelfth districts, was particularly alleged, and a sample of each of the said ballots was attached to the answer, marked, respectively, "Exhibit A" and "Exhibit B."

It was also alleged in the answer that there were sixty-four ballots counted for petitioner, Cross, which were less than $6\frac{7}{8}$ inches in length, and one ballot was counted for him which was less than $2\frac{2}{16}$ inches in width; that of these ballots thirty were deposited in the ballot box in the Sixth district, an thirty-four were deposited in the ballot box of the Winfield district; and that the thirty ballots which were cast in the Sixth district were also illegal on account of the marks and words above described. It was insisted that all of these ballots, for the reasons mentioned, should be rejected.

On August 21, 1906, the petitioner filed an amended petition, in which, in addition to the grounds of contention relied upon in the original petition, he alleged that twenty-eight persons whose names were given and who had voted for contestee, Keathley, in the Fifth district, were not citizens of Scott county, and were therefore not entitled to vote. On August 26, 1906, the contestee filed an answer to this petition, in which he denied that portion of the allegation in reference to the persons voting in the Fifth district.

In the county court the case was decided in favor of

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the petitioner or contestant, and judgment rendered accordingly. From this judgment an appeal was prayed and prosecuted to the circuit court. In the latter court, the judgment of the county court was affirmed; it having been held by his honor the trial judge that the returns from the Eleventh district should be counted, and that the classes of ballots which had the marks or lines and the superfluous words alleged in the contestee's answer were not for that reason invalid; that the short and narrow ballots had been clipped after being voted, and consequently were properly counted; and that the persons mentioned in the amended petition as having voted for contestee in the Fifth district were not citizens of Scott county and were not legal voters. On these grounds, as stated, judgment was entered in favor of the petitioner, contestant, Cross.

From the latter judgment, after motion for a new trial had been made and overruled, an appeal was prosecuted to this court by the contestee, and errors have been here assigned.

The errors assigned are as follows:

“(1) The court erred in counting for contestant the thirty-four short ballots, and the one narrow ballot from the Winfield precinct in the Eighth district, and the thirty short ballots in the Sixth district. He should have held that said ballots were invalid, because when voted they were of less length, and the one ballot was of less width, than as required by law.

“(2) The court erred in refusing to reject the 361

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ballots which were cast for Cross in the several districts alleged in the contestee's first answer, and which had printed thereon, before the name of each office, the word 'for,' and also had printed thereon, and extending more than three-fourths of the way across said ballot, three dotted lines or marks, and also extending one-third to one-half of the way across said ballot three heavy black lines or marks. The court should have held that said words and marks rendered said ballots invalid.

"(3) The court erred in refusing to reject the 156 ballots which were counted for Cross in the several districts alleged in the contestee's first answer, which had printed thereon, before the name of the office to be filled, the word 'for,' and also after the words 'justice of the peace' the words 'vote for two,' and after the words 'school directors' the words 'vote for three,' and also had printed thereon, and extending about three-fourths of the way across the same eight broken lines or marks, and extending from one-third to one-half of the way across the same, three heavy black lines or marks. The court should have held that on account of the presence of said words and marks on said ballots the same were invalid.

"(4) The court erred in excluding from the votes counted for contestee the twenty-eight ballots which were cast for him and counted by the election officers in the Fifth district. The court should have held that, said votes having been received and counted by the election officers, the presumption was that they were

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legal, and that there was not sufficient evidence introduced upon the subject to overcome this presumption.

“(5) The court erred in setting aside the action of the election commissioners in refusing to count the votes from the Eleventh district, and in now permitting said votes to be counted and considered in making the final result of said election.”

The questions raised by assignments Nos. 1, 2, and 3 arise under the uniform ballot law (chapter 21, p. 42, Acts Ext. Sess. 1891), and in an amendment thereto (chapter 101, p. 208, Acts 1893).

The first act (omitting the caption and the enacting clause) reads as follows:

“Section 1. That in all elections in the State of Tennessee, whether national, State or county, or municipal, except where the provisions of the act approved April 4, 1889, being chapter 188 of the printed Acts of 1889, and the acts amendatory thereof apply, the ballots to be voted shall be of plain, white paper, seven inches long and three inches wide, upon which the office to be filled, with the name or names to be voted for, shall be plainly written or printed.

Sec. 2. That it shall not be lawful to print or place any picture, sign, color, mark, index or insignia thereon, and any ballot of less or greater dimensions than as provided in the first section of this act, or any ballot upon which said picture, sign, color, mark, index or insignia may be placed, if found in the ballot box shall

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not be counted by the judges holding said election, but shall be treated as invalid.

“Sec. 3. That it shall not be lawful for any person to give, offer or impose upon any elector exercising or in contemplation of exercising the elective franchise at any election in this State any ballot other than is provided as aforesaid; and any person so offending shall be guilty of a misdemeanor, and on conviction, shall be fined not less than twenty-five nor more than fifty dollars, and imprisoned ninety days in the county jail or work-house.

“Sec. 4. That any officer holding said election who shall knowingly receive, or the judges thereof who shall count any ballot other than as provided in the first section of this act shall be also guilty of a misdemeanor, and on conviction thereof shall be punished as provided in the third section of this act.

“Sec. 5. That the grand juries of this State are hereby given inquisitorial power touching offenses committed under this act.

“Sec. 6. That all laws and parts of laws in conflict with this act be and the same are hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it.”

Chapter 101 of the act of 1893 amends the first section of the above-mentioned act of 1891 so as to provide “that the ballots to be voted shall be of plain, white paper, three inches wide and seven inches long; provided that they shall not deviate more than one-eighth of an

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inch in length and one-sixteenth of an inch in width."

If the ground of the circuit judge's action in respect of the question presented by the first assignment is sustained by the evidence, of course, his conclusion in respect of that matter, was correct; that is, if the ballots were clipped after they were voted, this certainly could not invalidate the action of the election officers in counting them. Nor could it justify the circuit judge or this court in throwing them out in the present contest. However, in the view we take of this case, we find it unnecessary to decide the question of fact. We also are of the opinion that it is unnecessary to decide the questions raised by the fourth and fifth assignments, since we are of the opinion that the controversies presented by the second and third assignments are decisive of the case.

We shall therefore confine this opinion to the consideration of the two assignments last mentioned.

We have been referred by counsel to numerous cases from other States construing more or less similar statutes enacted by the legislatures of those States. These decisions, many at least, can be of little service to us, further than to warn us of the confusion which necessarily arises when an attempt is made to give what may be called an equitable construction to such statutes, rather than one which seeks to rigidly enforce the policy evidenced by their enactment. It would be an unnecessary waste of time to attempt an examination of a title of these cases. We shall refer, in the course of what follows, to a few of these decisions which seem to us

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to be especially apposite to the controversy now before the court; but we shall base our conclusion wholly upon what we deem to be a proper construction of our own statute in the light of the policy of such legislation.

It is manifest from the stringent provisions concerning the length and width of the ballot, and the careful and exact language of the amendment in respect thereto, that it was the purpose of the legislature that the provisions of the act should be obeyed with exactness. This purpose likewise is shown in the sections providing for criminal responsibility.

It was the clear purpose of the legislature that the ballots should be of a specified length—no longer and no wider than prescribed—except a little play allowed for the shrinking of the paper after drying, as shown in the amendment. It was its purpose that these ballots should be on plain, white paper, and that they should have nothing on them except the name of the office to be filled and the name or names of the candidates voted for. The rules thus laid down in the statute are clear and explicit, and may be easily complied with. They can be understood by voters of all degrees of intelligence; no speculation is needed; no fine-spun distinctions; no subtle reasonings. If we depart from this plain path, and digress into controversies whether from this or that extraneous feature appearing in the ballots the intention of the voter can be gathered, or whether this or that extraneous matter renders the intention of the voter uncertain, as some of the decisions do, we at once render

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uncertain that which was clear, definite, and precise, and lay the ground for endless controversies.

We are of the opinion that the policy underlying our statute can be best served by adhering as nearly as possible to a literal construction.

Assignments Nos. 2 and 3 set forth correctly the contents of the record upon the subjects therein referred to, except that the lines referred to as heavy black lines are more accurately described as solid black lines.

We think it clear that the broken or dotted lines and the solid black lines referred to in these assignments were marks of a kind which render these ballots void under the act of 1891. We are also of the opinion that the words "vote for two," and the words "vote for three," appearing upon the ballots mentioned in the third assignment, were such signs, marks, or insignia as likewise rendered those ballots void.

We are likewise of the opinion that the use of the word "for" in the manner stated in the second and third assignments rendered all the ballots referred to in those assignments void.

We shall now refer to two or three decisions stating similar views.

The Mississippi statute provides that: "All ballots shall be written or printed with black ink with a space of not less than one-fifth of an inch between each name, on plain white news printing paper, not more than two and one-half, nor less than two and one-fourth inches

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wide, without any device or mark by which one ticket may be known or distinguished from another, except the words at the head of the tickets; but this shall not prohibit the erasure, correction or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted."

In *Oglesby v. Sigman*, the ballots in question in that case had under the heading "Republican National Ticket" a printer's line or dash rule of slightly ornamental character, and at three other distinct places a name, a dash rule; two of them being plain. It was held that they vitiated the ballots, as marks by which one ticket might be distinguished from another. 58 Miss., 502.

In *Steele v. Calhoun*, a printed dotted line between the last office named on it and the preceding name was held to invalidate the ballot; the court affirming that it was not permitted to distinguish between the different devices or marks put on ballots. 61 Miss., 556.

In another case, tickets were rejected because the names of the candidates for the legislature were found to be less than one-fifth of an inch apart. *Perkins v. Carraway*, 59 Miss., 222.

Other instances of a similar rigid construction may be found in the following cases:

In *State, ex rel. McMillan, v. Sadler*, 25 Nev., 131, 58 Pac., 284, 83 Am. St. Rep., 573, it was held that ballots with equation marks between the printed names of the

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candidates and the party designation were invalid. In *People, ex rel. Beasley, v. Sausalito*, 106 Cal., 500, 39 Pac., 937, it was held that a ballot on which the marks were made with a lead pencil, and not with the official stamp, as required by statute, should be excluded. In *People, ex rel. Obert, v. Bourke*, 30 Misc. Rep., 461, 63 N. Y. Supp., 906, it was held that ballots marked with a purple lead pencil, instead of a black pencil, as required by the New York election law, were invalid. It has also been held in other cases that ballots marked with ink, or with blue or purple pencils, instead of black lead pencils, as required by statute, are invalid and cannot be counted. *State, ex rel. McMillan, v. Sadler*, supra; *Dennis v. Cauglin*, 22 Nev., 447, 41 Pac., 768, 29 L. R. A., 731, 58 Am. St. Rep., 761.

In *Van Winkle v. Crabtree*, 34 Or., 462, 55 Pac., 831, it was held that ballots on which the word "voted" or "voted for" were written after the name of a candidate contained distinguishing marks by which they might be identified, and should not be counted. In *State, ex rel. Baxter, v. Ellis*, 111 N. C., 124, 15 S. E., 938, 17 L. R. A., 382, it was held that ballots marked on the outside with the letters "O. K." in lead pencil could not be counted. In *State, ex rel. Orr, v. Fawcett*, 17 Wash., 188, 49 Pac., 346, it was held that ballots on which were written across the amendments the words "rats," or "don't want any king," should be excluded. In *Mauck v. Brown*, 59 Neb., 313, 81 N. W., 313, it was held that a ballot marked with a cross in a party circle, and con-

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taining the word "against" written under the name of a candidate for an office of another party, and the word "for" written under the name of a candidate for the same office of the party in whose circle the cross was made, contained identifying marks within the prohibition of the Nebraska statute, and should not be counted.

In *Fields v. Osborne*, 60 Conn., 544, 21 Atl., 1070, 12 L. R. A., 551, it was held that the word "for," appearing before the name of the office on all the ballots used in the election, did not invalidate them, on two grounds: First, because the statute was ambiguous, and it could not be clearly determined whether the use of this word was improper; and, secondly, because it was used generally upon the tickets of both parties. Concluding the discussion of the question, the court said: "If the regular ballots issued by a political party contain the word 'for' before the title to the offices therein named, then it cannot be held to be a mark or device, so that the same can be identified in such manner as to indicate who might have cast the same, and therefore is not obnoxious to that provision. If the regular ballots of the political party omit the word 'for,' then the use of the word on some of the ballots cast, inasmuch as it would be a mark or device by which the same might be identified, would be irregular. Each case must be governed by its own circumstances, and be decided as a question of fact under the principles herein stated."

In the later case of *State, ex rel. Phelan, v. Walsh*, 62 Conn., 260, 21 Atl., 1, 17 L. R. A., 364, 369, *Fields v. Osborne* was followed without comment. Even under

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the case of *Fields v. Osborne* the use of the word "for," in the present case would make the ballots void, because they were only a part of the ballots used in the election and were distributed all over the different voting precincts, as follows: Of the kind within the second assignment there were four votes in the Second district, at Huntsville; at Helenwood there were seven, in the same district; in the Third district, at Glenmary, there were sixty-four, and at Robbins there were twenty-five, in the Fourth district there were ten; in the Sixth district there were 32; in the Seventh there were twenty-eight; at Oneida, in the Eighth, there were eighty-seven; at Winfield, in the Eighth, there were twelve, in the Ninth district there were six; in the Tenth district fifteen, in the Eleventh district there were twenty, and in the Thirteenth there were fifty-one.

Of the kind of ballots described in the third assignment there were eight votes at Helenwood in the Second district, and eight at Glenmary in the Third district, and at Robbins in that district eighteen; and there were ten in the Fourth district, nineteen in the Sixth district, twenty-two in the Seventh district, thirty in the Eighth district at Oneida, one at Winfield, sixteen in the Ninth district, three in the Tenth district, three in the Eleventh district, fifteen in the Thirteenth district, and three in the Fourteenth district.

We deem it unnecessary to state the reasons underlying the passage of the act in question, further than that it was to prevent fraud. What the various devices of fraud may be no man can forecast. We deem it unwise

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to further confine the act, but if the purpose of the act was to check, among other devices of fraud, that of bribery and intimidation, and as a means thereto rendering impossible methods of identification, then it is clear that the use of any of the marks mentioned, or any of the words mentioned, might be a device of identification. Of course, as the number of the ballots so used increases, the opportunity for identification is lessened. Still the law cannot be administered on such basis, because it would be impossible to say at what number the capacity to identify would end. The question must be decided on the quality and capability of the word or device, rather than upon any such consideration as the number of persons who may make use of it. A rule based on the number that might be used would be wholly impracticable and incapable of administration.

On the grounds stated, we are of the opinion that the 361 ballots mentioned in the second assignment, and the 156 mentioned in the third assignment, were improperly counted for the petitioner, contestant, and that the circuit judge committed error in holding to the contrary, and the judgment must be reversed.

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WILL HURD v. STATE.*

(Knorrville. September Term, 1907.)

1. **CRIMINAL LAW.** No authority to arrest without warrant for a misdemeanor not committed in the officer's presence.

An officer has no authority to arrest one without a warrant for the misdemeanor of unlawfully carrying a pistol, or for other misdemeanors, not committed in his presence, but the commission of which is communicated to him by others. (*Post*, pp. 591-593.)

Code cited and construed: Sec. 6997 (S.); sec. 5863 (M. & V.); sec. 5037 (T. & S. and 1858).

Code cited and approved: Pesterfield v. Vickers, 3 Cold., 215.

2. **SAME.** Killing in resisting arrest by one without notice of his official character is manslaughter or in self-defense, when. Where one kills an officer attempting to arrest him, and there is nothing from which the official character of the officer can be inferred, the offense is reduced to manslaughter, though the officer had power to make the arrest; and where a person is placed in a position in which his life is imperiled by the act of another, having no notice of the official character of the latter, and the killing is apparently necessary to save his own life, the homicide is committed in self-defense, though the officer was legally seeking to arrest the accused. (*Post*, pp. 591-597.)

Case cited and approved: Note in Keady v. People, 66 L. R. A., 353, 387.

3. **SAME.** Charge erroneous as to want of knowledge of official character of the arresting officer, and lawfulness of arresting for a misdemeanor without a warrant.

Where, on a trial for the murder of an officer while attempting to arrest the accused who killed the officer in resisting such

*As to homicide in resisting arrest, see note to Keady v. People (Colo.), 66 L. R. A., 353.

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arrest, there was a conflict in the testimony on the questions (1) whether the accused knew that the deceased was an officer and was attempting to arrest him, and (2) whether a third person said to the deceased: "Shoot the —; he has got a gun," the failure to charge that the want of knowledge of the official character of the deceased and his purpose to make the arrest might, if the other facts warranted it, reduce the homicide to manslaughter, and the giving of a charge that the officer might make the arrest for a misdemeanor not committed in his presence, with or without warrant, accompanied by a charge that the material inquiry was whether the deceased was attempting to make a lawful arrest, and if he was, and while in the discharge of his duty, using no more force than was reasonably necessary, the accused killed him he would be guilty of murder, constituted reversible error. (*Post*, pp. 588-597.)

FROM HAMILTON.

Appeal in error from the Criminal Court of Hamilton County.—S. D. McREYNOLDS, Judge.

HOWELL TITUS, for Hurd.

ASSISTANT ATTORNEY-GENERAL FAW, for State.

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MR. JUSTICE MCALISTER delivered the opinion of the Court.

The prisoner was convicted in the criminal court of Hamilton county for the crime of murder in the first degree, with the judgment of death, for the unlawful killing of one T. O. Musgrove. The deceased was a policeman of the city of Chattanooga, but at the time of his death was dressed in citizen's clothes, and it does not distinctly appear that the prisoner knew at that time the deceased was a police officer. The theory of the state is that Musgrove at the time of his death was attempting to arrest defendant, Hurd, for the offense of unlawfully carrying a pistol.

The shooting, which resulted in the death of Musgrove a few hours later, occurred about 9 or 9:30 o'clock p. m., on White street, in South Chattanooga, near the saloon of one E. L. Shepherd. This saloon was situated on the corner of Whiteside and White streets, fronting on the east side of Whiteside street and running back along the north side of White street. There are large glass doors in the front of the saloon, and at the rear end of the building there was a door leading from the back room of the saloon out into White street. The saloon was divided by a partition into two rooms, and the front room was known as the white bar, and the rear room as the colored bar; but there seems to have been an indiscriminate mixing of the whites and blacks at each of these bars. Witnesses testified that this saloon was the usual loafing place of Musgrove, the deceased, when

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he was off duty. At the time of the tragedy, deceased was off duty, and had been around the saloon for some hours, sitting in the back room with some white men and some negroes; and it is stated by the barkeeper, a State's witness, that Musgrove was endeavoring to sober up, as he was expecting to go on duty the same night. Among other persons in the back room with deceased were J. D. Drennan, who, the barkeeper says, had been drinking, but was also sobering up. The prisoner went into Shepherd's saloon about half or three-quarters of an hour before the shooting. It is shown he remained in the front room, and did not go back to the rear room, where the deceased was; and it does not appear that deceased and the prisoner saw each other until the meeting in the street at the time of the shooting.

While the prisoner was in the front room, the barkeeper, Culver, treated defendant a time or two, and the defendant treated Culver to drinks or cigars. The prisoner took four or five drinks, and during the conversation, according to the witness Culver, the prisoner was "telling them in there about the deputy sheriffs and police, and said that he always got on very well with the deputy sheriffs and police, but when one went to arrest him he is going to get the contents of my gun." And in a few minutes he said, "I can't tell you anything about white men, but I can tell you all about a nigger, and I ain't got half time to tell you about them." It seems that in a few minutes Shepherd, the proprietor of the saloon, who was an intimate friend of the deceased, and

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who had been in the back room with the deceased while the conversation between the prisoner and the barkeeper and others occurred in the front room, came into the front room and began to check up his cash register. The prisoner, who knew Shepherd, asked him to "set 'em up." Shepherd declined. The prisoner then asked Shepherd to take a drink with him, or, as the barkeeper testified, the prisoner said, "If you are going to be short about it, I will set 'em up," and remarked to Shepherd, "I have been trading here with you over two years," to which Shepherd replied, "I don't give a d—n if you have; I am not going to set 'em up, and if you don't like it you can just get out of my place," to which the defendant replied, in substance, "All right, Mr. Shepherd; I will get out of your place—I am as good a man as any man," and started towards the door. As the prisoner passed out of the front door to Whiteside street, Shepherd, the proprietor of the saloon, threw a glass at him, which struck the door facing and crashed, without striking the defendant. Culver, the barkeeper, testified that immediately thereafter he saw the prisoner out on the sidewalk with a pistol in his hand. Thereupon the barkeeper seized a pistol from behind the bar, and, covering the prisoner, said to him, in substance, "If you shoot in here you are a dead nigger," and thereupon the prisoner started around the corner down Whiteside street eastward in the direction of his home.

As already stated, there was a door leading from the rear room of the saloon out into White street. As the

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prisoner disappeared around the corner, going into White street, Culver, the barkeeper, passed through the partition door into the rear room of the saloon, and there stated to Musgrove, the deceased, that a fellow had gone around the house with a gun, and to go out and catch him. Thereupon Musgrove, the deceased, turned and went out of the back door of the saloon opening on White street, while Culver, the barkeeper, went out the front door leading into Whiteside street. Culver was accompanied by the witness W. R. McIntosh, a nephew of the deceased, and Drennan, who was sitting in the rear room with Musgrove, followed Musgrove out the back door. Musgrove intercepted the prisoner about the edge of the street car track, and immediately seized him, when a struggle ensued.

There is testimony tending to show that, as Musgrove approached the deceased, Drennan, who was following Musgrove, exclaimed, "Shoot the ———; he has got a gun." About this time the prisoner raised his pistol and fired two shots at Drennan, both of which took effect, one in the body and the other in the arm or hand. After shooting Drennan, the prisoner turned his pistol on Musgrove, shooting him three times. Extricating himself from the grasp of Musgrove, the prisoner ran from the scene, followed closely by Musgrove, who in the meantime had drawn his own pistol and emptied it at the prisoner, while the latter was running, but none of his shots took effect. The prisoner having escaped, Musgrove reloaded his pistol and returned to the saloon, but

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was soon carried to his own home, where he died a few hours later.

The prisoner admits that he knew Musgrove, at least by sight; but he states that he had never seen him except in a policeman's uniform. In this connection, as already stated, Musgrove was in citizen's clothing and was not wearing the uniform of a policeman.

It should be stated that the killing occurred in the night, between 9 and 9:30 o'clock; but there was an electric light at the corner of Whiteside and White streets, and it was a moonlight night. The evidence, however, is undisputed that Musgrove, the deceased, had a policeman's star under his coat. Culver and Musgrove, who were standing at the northwest corner of the saloon at the corner of Whiteside and White streets when the tragedy occurred, both testify that when Musgrove seized the prisoner, and before the shooting, Musgrove threw back his coat, showing his badge, and saying to defendant: "Consider yourself under arrest. I am an officer of the law." It is due the defendant to say that he denies that he heard this statement, or that he saw the star, or that he recognized the deceased.

The theory of defendant is that, when Shepherd threw the glass at him as he emerged from the door of the saloon, he was excited and alarmed, and immediately ran around the corner of Whiteside street and started directly home. He denies that he drew his pistol in front of the saloon on Whiteside street. The evidence is uncontradicted that the prisoner, after passing out of the sa-

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loon on Whiteside street, left the scene of the difficulty, turned down White street, and was proceeding in the general direction of his home, and was so proceeding when the deceased, accompanied by Drennan, ran out of the back door of the saloon on White street and seized the prisoner. It appears that, when the deceased and Drennan emerged from the saloon, the prisoner attempted to avoid them and went into the middle of the street. His theory is that he did not know that Musgrove was an officer, and believed that the approach of these parties was for the purpose of continuing and following up the assault which had already been made upon him in the saloon. He claims that this belief was based upon the fact that two men followed him around the corner of Whiteside street from the front room of the saloon, and two men emerged from the rear room through the door on White street.

The defendant, it should be stated, proved a good character. Mr. A. F. Gustafson, proprietor and manager of the Gustafson Manufacturing Company, testified that defendant had been in his employ almost continuously for three years immediately preceding the homicide, and that his general character for peace and quiet in the community was excellent; that his general reputation for truth and veracity among the shopmen was very good, and from that general reputation he would give him full faith and credit on his oath in a court of justice. Three other witnesses testified to the good character for peace and truth of the prisoner. The State in-

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troduced no witnesses attacking his general character.

An examination of the record has satisfied us that there was a conflict in the testimony upon two material questions of fact: (1) Whether defendant knew, or the circumstances were such as necessarily to fix him with knowledge, that deceased was an officer and was attempting to arrest him; and in this connection whether deceased threw back his coat, and showed his policeman's star, and said to defendant, "Consider yourself under arrest; I am an officer of the law." (2) Whether Drennan said to Musgrove, the deceased, as he left the door and advanced toward defendant, "Shoot the —; he has got a gun." In view of this conflict in the testimony, the object of the persons who were advancing upon the defendant was a very material inquiry in the case, as it would illustrate the mind of the defendant as to his apprehensions of danger.

We are of opinion, in view of the facts disclosed in this record, that the trial judge was in error in charging the jury as follows:

"If T. O. Musgrove, deceased, was a policeman in the city of Chattanooga at the time he was killed, and direct information was brought to him that defendant, Hurd, had a pistol on his person, it was his duty, as well as his lawful authority, to arrest said Hurd, with or without a warrant; and as to whether or not he was in uniform would be immaterial. According to the State's theory of this case," continued the court, "It is immaterial as to who was in fault in the difficulty in the

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saloon, or as to what occurred therein. The material question for you to inquire, according to their theory, is: Was Policeman Musgrove, at the time he was killed, attempting to make a lawful arrest? And, if he was, and while in the discharge of his duties, using no more force than was reasonably necessary, the defendant, Hurd, refused to be arrested, and killed Policeman Musgrove, then he would be guilty of murder."

Now, as already stated, we are of opinion that these instructions present reversible error in this record. The theory of the State was that the deceased, Musgrove, was attempting to arrest the prisoner for the offense of unlawfully carrying a pistol, which offense is not a felony, but a misdemeanor, under our statute.

Section 6997, Shannon's Code, provides: "An officer may, without a warrant, arrest a person (1) for a public offense committed, or a breach of the peace threatened, in his presence; (2) when the person has committed a felony, though not in his presence; (3) when a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it; (4) upon a charge made upon a reasonable cause of a commission of a felony by the person arrested."

So, in view of our statute, it was held, in *Pesterfield v. Vickers*, 3 Cold., 215, "that a police officer of a city or town cannot arrest for an offense against the ordinances of the city, unless the offense was committed in his presence, without first obtaining a warrant, unless the person arrested is guilty of a felony."

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It is clear from the record that the deceased was attempting to arrest the defendant for a misdemeanor which was not committed in his presence; but the fact of its commission was communicated by others, and the instruction of the trial judge that deceased had lawful authority to arrest defendant without a warrant was erroneous.

But, in addition to this erroneous statement of the law, the court instructed the jury that whether or not he (Musgrove) was in uniform would be immaterial. The instruction, we think, ignored the main defense of the prisoner—that at the time of the homicide he was not aware of the official character of the deceased.

In Wharton on Homicide (2d Ed.), section 403, it is said:

“Where an officer or his assistant is killed in the resistance of an arrest, it is a material inquiry, in determining the criminality and degree of the homicide, whether the party resisting arrest had knowledge or notice of the official character of the officer and of his purpose to exercise official authority. If there is no such knowledge or notice, the homicide cannot be more than manslaughter, unless the resistance was in enormous disproportion to the threatened injury. And where one kills an officer attempting to arrest him, if there is nothing from which the official character of the officer can be inferred, the measure of his offense descends from murder to manslaughter. And this is the rule, though

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the officer had power to make the arrest without a warrant, where he was required by statute, in executing the warrant, to make known the authority. And the rule that it is murder to kill a human being without authority of law, when it is done in the commission of an act dangerous to others and evincing a depraved heart, regardless of human life, though without a premeditated design to effect the death of any particular person, is not applicable to a case in which the accused was suddenly accosted by a crowd of armed men demanding his immediate surrender. So, if a person is placed in a position in which his life is imperiled by the act of another, having no notice of his official character, and the killing is apparently necessary to save his own life, it is homicide in self-defense, though the deceased was legally seeking to arrest him; the accused not knowing, or having reasonable grounds to know, that he was an officer. But, though it is the duty of an officer to give notice of his intention to arrest before doing so, the person sought to be arrested may not lawfully resist or kill his assailant until all other means of peaceably avoiding the arrest have been exhausted. And the omission of the officer to exhibit his warrant or declare his authority can do no more than deprive him of the protection which the law affords him in the rightful discharge of his duty, and does not justify the person sought to be arrested in killing him, if the apparently illegal arrest can be otherwise resisted. And the question of the knowledge of the person sought to be arrested of the

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official character of the person seeking to arrest him in such case is one of fact for the jury."

In a learned note to the case of *Keady v. People*, 66 L. R. A., 353, 387, it is said:

"In case of an unlawful arrest, or attempt to arrest, killing the person attempting it is, as a general rule, manslaughter only. A person seeking unlawfully to arrest another is a trespasser, and the trespass is a ground of provocation sufficient to reduce the homicide of such person in resistance of the arrest from murder to manslaughter, though it is not so reduced unless the person sought to be arrested actually acted under the influence of hot blood induced by the provocation. And such an attempt unlawfully to arrest gives the person sought to be arrested a right to resist, even to the extent of killing his opponent, if such killing is necessary to save himself from serious bodily harm; but the necessity must have been real and apparent.

"The amount of force which he may use in self-defense, however, is that only which is necessary to prevent the carrying out of the unlawful purpose. If excessive force is used in making resistance, the right of self-defense is eliminated, and killing by means calculated to cause death, with knowledge that the intent was only to arrest, is murder; and an unintentional killing in making such resistance, by means not calculated to cause death, is manslaughter."

We think these excerpts enunciate the correct rule of law applicable in such cases. It will be observed that

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the trial judge wholly fails to instruct the jury that want of knowledge of the official character of the officer and his purpose to make the arrest might, if the other facts warranted, reduce the grade of homicide from murder to manslaughter, but, on the other hand, committed affirmative error in instructing the jury that the officer might make an arrest for a misdemeanor not committed in his presence, with or without a warrant, and it was an immaterial inquiry whether or not the deceased was in uniform. This error was intensified by the instruction given in the immediate context wherein he stated that: "The material inquiry was whether Policeman Musgrove, at the time he was killed, was attempting to make a lawful arrest. If he was, and while in the discharge of his said duties, using no more force than was reasonably necessary, the defendant, Hurd, refused to be arrested, and killed Policeman Musgrove, then he would be guilty of murder." The court had already instructed the jury what constituted a lawful arrest, and that it was not necessary that the officer should have a warrant to arrest for a misdemeanor not committed in his presence; and that charge was followed by the instruction that if the officer, in effecting such an arrest, used no more force than was reasonably necessary, and the defendant killed him, then he would be guilty of murder. If the arrest was unlawful, then the grade of the homicide might be reduced from murder to manslaughter, depending on the other facts and circumstances of the case. This phase of the case was not presented to the

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jury in the charge of the court; but, on the other hand, the court committed affirmative error in charging that the arrest was lawful.

For the error in the charge, the judgment is reversed, and the cause remanded.

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**J. L. JOHNSON v. CONTINENTAL INSURANCE COMPANY OF
NEW YORK.**

(*Knowville*. September Term, 1907.)

- 1. PAROL EVIDENCE.** Inadmissible to vary insurance policy and premium notes providing for nonliability on policy for nonpayment of premium.

Where a fire insurance policy and the premium notes given therefor provide that the insurer shall not be liable for any loss or damage occurring while any premium remains past due and unpaid, parol evidence is inadmissible in an action on the policy to show a waiver of such provision made by the agent of the insured before and at the time of executing the notes and making the insurance contract. (*Post*, pp. 601-610.)

Cases cited and approved: *Richardson v. Thompson*, 1 Humph., 154; *Campbell v. Upshaw*, 7 Humph., 185; *Hancock v. Edwards*, 7 Humph., 349, 354; *Blakemore v. Wood*, 3 Sneed, 474; *Ellis v. Hamilton*, 4 Sneed, 514; *Bryan v. Hunt*, 4 Sneed, 544, 545, 546, 547; *Bridges v. Robinson*, 2 Tenn. Chy., 723; *Rice v. Steger*, 3 Tenn. Chy., 328; *Bender v. Montgomery*, 8 Lea, 586, 593; *Stewart v. Insurance Co.*, 9 Lea, 104, 112; *Klein v. Kern*, 94 Tenn., 37; *Hines v. Willcox*, 96 Tenn., 158; *Lewis v. Turnley*, 97 Tenn., 197; *Lyons v. Stills*, 97 Tenn., 514; *Quigley v. Shedd*, 104 Tenn., 560; *Myers v. Taylor*, 107 Tenn., 364; *Turner v. Abbott*, 116 Tenn., 718; *Insurance Co. v. Mowry*, 96 U. S., 544, and numerous cases from other States cited in the opinion on pages 608-610.

- 2. INSURANCE.** Evidence of agent's statement that he would take care of an installment policy for insured is inadmissible. In an action on a fire insurance policy for a loss resisted on the ground of forfeiture of the policy for nonpayment of the

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premium, evidence of a statement made by the agent to the father of the insured, subsequent to the making of the contract, that he would take care of the policy for the insured, is incompetent and inadmissible because not made in the course of the business or employment of the defendant, and because immaterial and irrelevant. (*Post*, pp. 610-612.)

3. **SAME.** Same. Statements of agent of insurer insufficient to waive forfeiture of policy for nonpayment of premium.

In an action on a fire insurance policy for a loss resisted on the ground of forfeiture of the policy for nonpayment of the premium, statements made to the insured by the insurer's agent, through whom the policy was issued, that he was attending to the insurance for the insured, and if the house is burned that the insured would get his money, are insufficient to justify the insured in assuming that he would recover for a loss after he had failed to recover a premium according to his contract. (*Post*, pp. 612, 613.)

4. **SAME.** Forfeiture for nonpayment of installment premium is not waived by indulgence as to previous installments, when notified to the contrary.

Where the insured, before maturity of an installment of premium, received notice from the insurer that on failure to pay the premium at maturity the policy would be suspended, and after maturity, a notice that because of the nonpayment the policy had been suspended and would remain so while the premium remained unpaid, he could not have been misled into believing that the policy was still in force, and not suspended because of a previous indulgence in being allowed to pay a premium after maturity. (*Post*, pp. 613-618.)

5. **SAME.** No reinstatement of policy by payment of past due premium made after the insured property was burned.

There can be no reinstatement of a policy forfeited for nonpayment of an installment premium by a payment made after the insured property had been destroyed by fire, since there

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could be nothing upon which the policy could operate. (*Post*, p. 618.)

6. **SAME.** Policy forfeited for nonpayment of installment premium is not revived by payment accepted without knowledge that property had been burned, when.

A fire insurance policy is not revived, after the insured property is burned, and after the forfeiture of the policy for the nonpayment of an installment premium, by the insured's payment of such premium to a clerk of the insurer's agent who had issued the policy or procured its issuance, without their knowledge that the property had been burned. (*Post*, pp. 618, 619.)

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
JOSEPH W. SNEED, Chancellor.

THOMAS L. CARTY, for complainant.

WEBB, McCLUNG & BAKER, for defendant.

MR. JUSTICE NEIL delivered the opinion of the Court.

This action was brought in the chancery court of Knox county on an insurance policy to recover \$1,500, the amount of insurance on the property described in the policy. There was a decree entered in favor of the complainant for the amount of the policy and interest,

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and from this an appeal was prayed and prosecuted to this court, and errors have here been assigned in behalf of the defendant. The complainant also assigned errors on the ground that the chancellor failed to allow to him the twenty-five per cent. penalty provided by statute in cases where the defenses are frivolous.

In order to properly understand the points made in the assignments of error filed by the defendant, it is necessary to state that Blackburn Bros. acted as agents of the company in securing the policy; that at the time the application was made, and an installment note executed for the premium, certain statements were made by Robert J. Blackburn, the member of the firm who conducted the matter, and these statements were objected to on the hearing below as incompetent. There were likewise statements of Blackburn proven by the wife of Mr. Johnson, and also by his father; the latter at a different time. All of these were objected to in the court below, but the objections were overruled. We shall presently state the substance of the evidence objected to and the grounds of the objection.

The installment note which was given for the premium was in the following words and figures:

"The company is authorized to insert in this note the number and date of policy.

"\$116.40. For value received in policy No. B ———, dated the ——— day of ———, 190—, issued by the Continental Insurance Company of New York, I promise to pay to said company, or order, at their office in

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Chicago, Illinois, with expenses of collection and attorney's fees, and without relief from valuation or appraisement laws, one hundred and sixteen and $\frac{40}{100}$ dollars, in installments as follows:

"\$29.10 upon the first day of December, 1902, and

"\$29.10 upon the first day of December, 1903, and

"\$29.10 upon the first day of December, 1904, and

"\$29.10 upon the first day of December, 1905, without interest.

"And it is hereby agreed that, in case of nonpayment of any one of the installments herein named at maturity, this company shall not be liable for loss during such default, and the policy for which this note was given shall lapse until payment is made to this company in New York or to the Western Department at Chicago, and in the event of nonsettlement for time expired, as per terms on short rates, the whole amount of installments remaining unpaid on said policy may be declared earned, due, and payable, and may be collected by law. Given in payment for a policy of insurance. If transferred either before or after maturity, this obligation shall be subject to all defenses as if owned by the payee herein named.

"J. L. JOHNSON."

The note was sent on to the company at Chicago, and some days afterwards a policy was sent to the complainant, and this contained the following upon the same subject covered by the provision at the bottom of the note, viz.:

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"But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note or obligation, or any part thereof, given for the premium, remains past due and unpaid."

The chief evidence objected to was contained in the deposition of Mr. Johnson, to the effect that during the negotiation for the policy, and before the execution of the note, at the time he was negotiating with the agent about the execution of the note, his attention was called to the dates of payment of the installments, and to the forfeiture clause appearing in the last paragraph of the note, and he told the agent that he was engaged in the contracting business, and could not get his money promptly, and did not know whether he would be able to pay the installments when they became due; that thereupon the agent said to him that he need not pay the installments when they became due, but could take his own time to make the payments when he got the money; and that he would waive, for the company, the provision for forfeiture, based on the failure to pay the installments when due.

Mr. Johnson testified in substance that he relied on this statement of the agent and executed the note.

This testimony was objected to on the ground that its purport and effect was to vary a written contract.

This objection was overruled by the chancellor. In this we think his honor erred.

There are a great many cases in our reports upon the

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general subject; some stating the rule, and some the exceptions to the rule. It is often difficult to decide when a case falls within one of the exceptions. The rule is that the contract cannot be contradicted or varied by parol. There are exceptions to the effect that an independent collateral agreement may be proven, and also that, when a prior parol contract is only partly reduced to writing, parol evidence may be heard to supply the parts omitted from the writing. The rules and many exceptions may be found stated in the case of *Hines v. Willcox*, 96 Tenn., 158, 33 S. W., 914, 34 L. R. A., 824, 832, 54 Am. St. Rep., 823. But it has never been held that the added matter could contradict the written portion of the contract, or the written contract; but the direct reverse has been held.

In *Stewart, Gwynne & Co. v. Insurance Co.*, 9 Lea, 104, 112, it is said:

"It will be observed that under these authorities parol proof may be heard as to an independent collateral agreement, or where there has been a parol agreement, and a part only reduced to writing, the whole contract may be proven; but in neither case is the writing to be contradicted." Again, on page 113, the court said: "We think the evidence was properly rejected. It was certainly not an independent collateral agreement. There was but the one contract, either the one specified in the receipt or the parol contract which the defendants offered to prove. Both contracts cannot stand. They are different in their terms and in their practical results,

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and one must give way to the other. Nor is it a case where only part of the contract was reduced to writing. As we have seen in such cases, there is to be no conflict between the parol contract and the writing. They stand together and are consistent. The only difference is the writing does not embrace it all. In our opinion, the parol proof in this case contradicts the writing, and is therefore not admissible."

It has often been held that parol proof cannot be heard to show that a promissory note was payable at a different time and in a different manner from that set forth in the instrument itself. *Hancock & Powell v. Edwards*, 7 Humph., 349, 354; *Campbell v. Upshaw*, 7 Humph., 185, 46 Am. Dec., 75; *Ellis v. Hamilton*, 4 Sneed, 514; *Bender v. Montgomery et al.*, 8 Lea, 586, 593.

The general rule upon the subject is well stated in *Bryan v. Hunt*, 4 Sneed, 544, 545, 70 Am. Dec., 262:

"It is a well-settled rule of the common law, independently of the statute of frauds, that where a contract has been reduced to writing, and is complete in its terms and free from ambiguity, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract. The written instrument must be considered as containing the true agreement between the parties, and as furnishing the best evidence of their

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final intentions and acts. And this rule, excluding prior or contemporaneous stipulations or conversations, applies with no less force to simple contracts than to contracts by specialty." See, also, *Richardson v. Thompson*, 1 Humph., 154; *Blakemore v. Wood*, 3 Sneed, 474; *Bridges v. Robinson*, 2 Tenn. Ch., 723; *Rice v. Steger*, 3 Tenn. Ch., 328; *Klein v. Kern*, 94 Tenn., 37, 28 S. W., 295; *Hines v. Willcox*, 96 Tenn., 158, 33 S. W., 914, 34 L. R. A., 824, 832, 54 Am. St. Rep., 823; *Lewis v. Turnley*, 97 Tenn., 197, 36 S. W., 872; *Lyons v. Stills*, 97 Tenn., 514, 37 S. W., 280; *Quigley v. Shedd*, 104 Tenn., 560, 58 S. W., 266; *Myers v. Taylor*, 107 Tenn., 364, 64 S. W., 719; *Turner v. Abbott*, 116 Tenn., 718, 94 S. W., 64, 6 L. R. A. (N. S.), 892.

In *Insurance Co. v. Mowry*, 96 U. S., 544, 24 L. Ed., 674, it is said:

"By the express conditions of the policy the liability of the company was released by the failure of the assured to pay the premium when it matured, and the plaintiff could not recover unless the force of this condition could in some way be overcome. He sought to overcome it by showing that the agent, who induced him to apply for the policy, represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no notification was given him before the maturity of the second premium, and for that reason he did not pay it at the

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time required. This representation before the policy was issued, it was contended in the court below and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy.

"But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid was there expressed for the very purpose of avoiding any controversy or question respecting them. The entire agreement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If by inadvertence or mistake provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases; but, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company.

"The previous representations of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy, subsequently issued, alone expressed the contract, an estoppel from the representations of a party can seldom arise, except when the representation relates to a matter of fact—to a present or past state of things. . . . An

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estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. . . . The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal agreements, and open the door to all the evils which that rule was intended to prevent."

In *Kimball v. Aetna Insurance Co.*, 9 Allen (Mass.), 540, 85 Am. Dec., 786, it appeared that the building covered by the policy of insurance was vacant at the time the policy was issued; but the assured agreed orally with the agent that it should be thereafter occupied, but this was never done. A loss subsequently occurring, it was held that the oral agreement was no defense to a recovery on the policy. The court said:

"An oral representation as to a future fact, honestly made, can have no effect; for, if it is a mere statement or expectation, subsequent disappointment will not prove that it was untrue, and if it is a promise that a certain state of facts shall exist or continue during the term of the policy it ought to be embodied in the written contract."

In *Ostrander*, on Fire Insurance (2d Ed.), section 358, it is said: "Where the policy made out and accepted by the insured provided that it would become void if the premises thereafter became vacant, and a vacancy subsequently occurred during the term of the insurance, it was held, on an action to recover under

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the policy, that plaintiff could not plead and show by parol testimony that defendant's agent had agreed with the plaintiff, when negotiating the insurance, that, if the premises should become vacant during the term of the policy, the insurance would continue valid, notwithstanding the inhibitory provision of the contract. To give legal effect to such executory agreements, in contravention of the plain terms of the written instrument, would be to set aside well-settled and important rules of law (citing *Hartford Fire Insurance Co. v. Davenport*, 37 Mich., 613; *Havens v. Insurance Co.*, 111 Ind., 90, 12 N. E., 137, 60 Am. Rep., 689; *Bennett v. Insurance Co.*, 55 N. J. Law, 377, 27 Atl., 641; *Virginia Fire & Marine Insurance Co. v. Morgan*, 90 Va., 290, 18 S. E., 191; *Union Central Life Insurance Co. v. Chowning*, 8 Tex. Civ. App., 455, 28 S. W., 117; *Phoenix Insurance Co. v. Wilcox & Gibbs Guano Co.*, 13 C. C. A., 88, 65 Fed., 724.)"

The author adds:

"As the subject of a parol agreement relating to a future performance, estoppel would not arise. Mr. Bigelow, in his consideration of this question, reaches a conclusion sustaining the proposition here contended for. He says: 'The representation or concealment must also in all cases have reference to a present or past state of things; for, if a party make a representation concerning something in the future, it must generally be either a mere statement of intention or opinion, uncertain in the

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knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract'”—citing Bigelow, Estop. (2d Ed.), p. 438.

The case of *Walton v. Agricultural Insurance Co.*, 116 N. Y., 326, 22 N. E., 443, 5 L. R. A., 677, is also referred to, wherein it appeared that the agent who took the application agreed with the insured that the title to the property might thereafter be changed without prejudice to his rights. The court held that such agreement was nugatory, as against the prohibition contained in the policy.

We think the testimony under examination was clearly at variance with the contract as expressed in the note and in the policy, and that the complainant could not have the benefit of the matter covered by this proposed testimony, except on a bill to reform the contract for mistake or fraud.

We are referred to the case of *J. J. White v. Home Insurance Co.* (MS. opinion of the court of chancery appeals), the decision in which case was subsequently affirmed by this court, in which similar evidence was considered. But that was a bill to reform the contract, and, of course, the evidence would be competent under such circumstances. In the present case we have a suit simply on the policy, and an objection to the evidence as being a variation of the writing. The difference is vital.

The remaining testimony objected to applies to statements made by Blackburn, the agent, after the execution and delivery of the policy.

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The difference between statements of the latter character and those that are made preceding and during the negotiation for the contract is thus marked in *Bryan v. Hunt*, *supra* :

"Though all verbal negotiations and stipulations between the parties to a written agreement, anterior to or contemporaneous with the execution of the instrument, are in general to be regarded as merged in it, it is well settled that the rule has no application to stipulations or agreements made between the parties subsequent to the execution of the written instrument.

"Agreements not by specialty, whether written or unwritten, are of the same grade and dignity, in law, and are denominated 'simple contracts.' Hence it follows that to admit evidence of a subsequent parol agreement, for the purpose of showing an abandonment, discharge, or alteration of the terms of a previous written agreement not under seal, would not be to affect or dissolve the agreement by matter of an inferior nature; and therefore it is generally admitted that it is competent to the parties to an executory written contract not under seal, at any time before breach thereof, by a subsequent verbal agreement founded on a sufficient consideration, either to waive altogether or dissolve or annul the previous written agreement, or in any manner to add to, subtract from, or vary or qualify the stipulations of such agreement, and thus to make a new or different contract."

4 Sneed, 546, 547, 70 Am. Dec., 262.

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The evidence of declarations made by the agent, subsequent to the making of the contract, were in substance these:

J. L. Johnson, Sr., the father of the complainant, testified that, a day or two after the insurance contract under examination therein was made, Blackburn called upon him, and asked him to use his influence with his son to induce him to take out a life insurance policy with the said Blackburn; that he declined to do this, on the ground that the complainant would have enough to do to pay the premium on the fire policy; that Blackburn replied that he need not mind this, because he (Blackburn) would take care of John in his policies.

This evidence was objected to, because not made in the course of the business or employment of the defendant company, and because immaterial and irrelevant.

We think the evidence was incompetent on both grounds.

There are certain other statements of Blackburn, testified to by complainant himself as made after the delivery of the policy, and which do not seem to be objected to. The substance of this testimony may be set forth in the following questions and answers:

"Q. State whether or not you ever requested either of the Blackburn Bros. not to allow your policy to lapse on the day your installment was due. A. Well, when he would name the life insurance business, I would tell him that the fire insurance was about all I could keep up, and he just made the remark that 'if your house

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gets burned up you will get your money.' That is about all the talk we ever had. Q. State whether or not you had had any conversation with Blackburn Bros., or either of them, prior to December 1, 1904, with respect to the installment note then due or to become due on December 1st. A. Well, nothing more than I have stated. Whenever I met him he would ask me about the life insurance, and I would tell him if I kept up the fire insurance I would be all right, and he would say: 'I am attending to that for you. Your insurance is all right. If your house ever gets burned up, you will get your money.' That was about his reply all the time."

There was nothing in these statements which would justify the complainant in assuming that, in case of a loss he would receive the insurance money, even though he should fail to pay premiums according to the terms of his contract. This evidence, considered aside from that which has been excluded as incompetent, was wholly indeterminate.

We shall now consider the last ground upon which it is insisted there can be a recovery.

Complainant insists that a custom or habit of business was established between the company and himself, whereby he was permitted to pay his premium for the two preceding years after the date of maturity, and they were received by the company. He says the origin of the practice on his part was the assurance given to him by the agent at the time the contract was entered into, the testimony as to which we have held to be in-

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competent; but he says, at all events, the practice was inaugurated, was sanctioned by the company, and was relied upon by him; that, but for his reliance upon this course of business, he would have paid his premium at the date; that he was able to do so, and would have done so. To this the company replies, through its counsel, that there was nothing inconsistent in the company's receiving premiums after the day, since by the terms of the policy, although the insurance was in a lapsed condition by the failure to pay—that is, during the time covered by the period between maturity and payment—yet the insured had the right at any time to restore his *status* by paying the amount remaining due and unpaid. To this the counsel for complainant returns there could be no automatic renewal or revival of the policy because of the following provision appearing therein: "Payments of notes must be to the Continental Insurance Company at its office in Chicago, Illinois, or its office in New York, or to an authorized person having such note in possession for collection. The company may collect, by suit or otherwise, the premium note or notes, and a receipt from the office of the company must be received by the assured before there can be a revival of the policy, which shall in no event carry the insurance beyond the original term." Attention is called to the fact that according to this provision "a receipt from the office of the company must be received by the assured before there can be a revival of the policy," and that no such receipt from the office was ever sent to the com-

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plainant. It is therefore insisted that the only proper interpretation of this course of business or mutual conduct of the parties was that the company was simply indulging the complainant with limited credit; the policy in the meantime being considered as in force.

The counsel for the defendant insists that this could not be the correct view of the matter, because on the 18th day of November, 1902, the defendant mailed to the complainant the following warning letter:

"Chicago, Illinois, Nov. 18, 1902.

"Mr. J. L. Johnson—Dear Sir: The second installment of your premium for insurance in this company will fall due on the first day of December (next month). The amount of said installment, and the number of the policy, are shown below.

" . . . Remittances may be made by express money order, etc.

" . . . We send you herewith an envelope addressed to us, in which please inclose the amount due, and your address as stated below, and forward to us.

"Do not fail to pay promptly, as the policy provides that insurance under it shall be suspended during delinquency of any part of your premium note. . . .

"In order that your payment may be promptly credited, you will please fill out and sign the following blank letter, and return with your remittance. A receipt will be sent you within ten days. If unnecessary delay occurs, please advise us, giving number of policy, amount and date of remittance.

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"In asking you for a prompt remittance of the amount falling due upon your note, we do so, not only because it is due, but because we feel its importance to you.

"No better investment can be made than to keep up a policy of insurance, . . . but, in order to pay its losses, a company must, in simple justice, receive pay for its policies. Can there be anything more unwise than to neglect payment of the small premium that guards you from disaster?

"CONTINENTAL INSURANCE COMPANY,

"G. E. KLINE, Vice Pres."

Attention is called to the fact that similar letters, relating to the second and third installments, were sent in November, 1903, and November, 1904. Likewise an additional letter was sent on December 15, 1904, after the due date for that installment of that year had passed, as follows:

"Chicago, Ill., Dec. 15, 1904.

"Mr. J. L. Johnson, Knoxville, Tenn., R. No. 7—Dear Sir: We have previously sent you notice of the maturity of your note given for insurance in this company, under policy No. 128,731, but have received no reply. We assume that our notice has miscarried or that you have some reason for not replying which we should be pleased to know. . . . Do not overlook the fact that insurance under the above policy is now in suspense, and that you have no protection under it while your premium past due remains unpaid. The amount of payment necessary to reinstate the insurance is \$24.90.

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"We trust that you will, without further delay, remit same to us by bank draft, or post office or express money order, drawn payable to the Continental Insurance Company, as per addressed envelope which we sent for your convenience with our former notice. We need not suggest to you that the company is in every way worthy of your confidence. The conduct of its business under the safety fund law makes its policy a particularly desirable one for a farmer, as the company could not fail by the burning of any large city. In replying, please quote the number of your policy.

"Very truly yours,

THE CONTINENTAL INSURANCE CO.

"GEORGE E. KLINE, Vice President."

It is insisted for the defendant that in view of the notices above copied, one, issued before maturity of the installment, warning the insured that in case of a failure to pay at maturity, the insurance would be suspended, and so remain during the delinquency, and the other, issued after the installment had become due, notifying him that by reason of nonpayment the insurance was then suspended, and that he would have no protection so long as the premium remained due and unpaid, he could not have been misled by indulgence into believing that the policy would not be suspended by failure to pay and would not remain in suspension so long as that failure should continue.

This seems to us the correct view of the matter. Opposed to this is only the single circumstance that, when

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installments had been paid after maturity during the two previous years, no formal receipt was issued from the office at Chicago containing a notice that the insurance was by such payment reinstated. The only interpretation of this fact that seems to us reasonable is that the company and the insured mutually elected to treat the payment itself as a reinstatement of the policy.

Of course, however, there could be no reinstatement by payment after the subject-matter of the policy, the property, had been destroyed by fire, since there could be nothing upon which the policy could operate.

In the present case it appears that about the 15th of January, 1905, after the property had been destroyed by fire, the complainant went to the office of Blackburn Bros., and paid the overdue installment to a lady clerk in the office. When the payment was called to the attention of the company, together with the fact that the loss had occurred before the payment was made, it directed Blackburn Bros., to return the money to the complainant, and this was done. At the time that the complainant paid the money to the lady clerk, he did not inform her, or any one in the office, that the property had been already destroyed. When the money was returned to the complainant, the reason stated was that it had been received without knowledge of the fact that a loss had already occurred, and it was therefore returned.

We are of the opinion that the policy became suspended on December 2, 1904, and was in this condition

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when the fire occurred on January 10, 1905; that the payment thereafter, under the circumstances stated, did not revive the policy; and that the company was under no obligation to receive or retain the payment so made after the loss had already occurred.

There is a wide distinction between the present case and *Life Insurance Co. v. Fallow*, 110 Tenn., 720, 77 S. W., 937, referred to in the brief of complainant's counsel.

It results that the decree of the chancellor must be reversed, and the bill dismissed.

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**SMOKY MOUNTAIN LAND, LUMBER & IMPROVEMENT
COMPANY v. C. F. LATTIMORE, County Trustee.**

(*Knoxville*. September Term, 1907.)

1. **TAXATION.** In reassessment proceedings, State board of equalization acquires jurisdiction of the person of the taxpayer by his appeal.

Where in a proceeding before the county trustee for the reassessment of property for taxation, the taxpayer appears in response to a citation, and after a hearing, he appeals from the trustee's decision to the State board of equalization, said board acquires jurisdiction of the person of the taxpayer. (*Post*, pp. 631, 632.)

Acts cited and construed: Acts 1903, ch. 258, sec. 31.

2. **SAME.** Decision is void where hearing was before but one member of State board of equalization, when.

In proceedings for the reassessment of property for taxation, the taxpayer appealing to the State board of equalization is entitled as a matter of right to a hearing before a legal quorum consisting of a majority of said board, and a decision rendered in a case, and signed by all the members where but one of the three members of the board sat at the hearing with the private secretary of another member, without the appellant's knowledge that such secretary was not a member of the board, is void. (*Post*, pp. 631-635.)

Acts cited and construed: Acts 1903, ch. 258, sec. 38, subsec. 1.

Cases cited and approved: *Cowan v. Murch*, 97 Tenn., 590; *Carroll v. Alsop*, 107 Tenn., 260; *Croker v. Crane*, 21 Wend. (N. Y.), 211.

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- 3. SAME. Same. Objection for want of quorum is excused, where taxpayer supposed a third party to be a member of board, when.**

In proceedings for the reassessment of property for taxation, where the appeal is heard before one member of the State board of equalization with the private secretary of another member of the same name sitting in the place of such member, and supposed to be such member, the taxpayer was excused from interposing an objection to the jurisdiction of the one member to hear the appeal, if, indeed, objection was necessary. (*Post*, pp. 626, 627, 633, 634.)

- 4. SAME. Injunction against collection of taxes under a void decision or judgment of the State board of equalization.**

Where the decision of the State board of equalization in a proceeding for the reassessment of property for taxation is void because there was no quorum present to hear the appeal before such board, a bill is maintainable to enjoin the enforcement of such judgment and to enjoin the county trustee from collecting the taxes. (*Post*, pp. 623, 626, 629, 635.)

- 5. SAME. Void judgment leaves appeal pending before State board of equalization; case reopened and valid judgment rendered.**

Where the decision or judgment by the State board of equalization in proceedings for the reassessment of property for taxation is void for want of a quorum at the hearing, the appeal remains pending before the board and it has the power and jurisdiction, upon proper notice to the parties, to reopen the case and render judgment or finding by the full board. (*Post*, p. 636.)

- 6. SAME. Judgment of reassessment by State board of equalization is not subject to collateral attack, when.**

The State board of equalization is a quasi court of record, and its judgment of reassessment of property for taxation in a proceeding by which it had jurisdiction of the taxpayer and the subject-matter is not subject to collateral attack for irregularities, as that it was unjust, based on no evidence, or

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insufficient evidence, or that the taxpayer had violated none of the provisions of the act upon which reassessments can be made. (*Post*, pp. 629-632, 636.)

Acts cited and construed: Acts 1903, ch. 258.

Case cited and approved: *Briscoe v. McMillan*, 117 Tenn., 115.

7. **SAME.** Same. Review of judgment of State board of equalizers as to evidence by certiorari only.

The question whether a taxpayer had violated some of the provisions of the statute (Acts 1903, ch. 258, sec. 38, subsec. 1) so as to authorize the reassessment of his property for taxation is a jurisdictional fact to be determined by the State board of equalization from the evidence before it; and the question whether it has this evidence is to be determined by the board. These matters can be reviewed only on a certiorari. (*Post*, pp. 625, 636.)

8. **SAME.** Reassessment is not prevented by regular assessment made and passed upon by county and State boards, and payment of the taxes.

The fact that the property has been regularly assessed in the first instance, the assessments passed upon by the county board of equalizers, and in turn, by the State board of equalization, and by it certified back to the county, and the taxes paid thereon, will not prevent a reassessment in a proper case. (*Post*, pp. 636.)

FROM MONROE.

Appeal from the Chancery Court of Monroe County.—T. M. McCONNELL, Chancellor.

Smoky Mountain, etc., Co. v. Lattimore.

MCCROSKEY & PEACE and **W. A. STONE**, for complainant.

ATTORNEY-GENERAL CATES, **HARRISON & STICKLEY** and **J. W. CULTON**, for defendant.

MR. SPECIAL JUSTICE HENDERSON delivered the opinion of the Court.

The bill in this case seeks to have declared void and set aside the back or re-assessment by the State board of equalization of complainant's lands for the years 1903, 1904, 1905, and 1906, and to enjoin the county trustee from collecting the taxes and penalties, etc., assessed. There was demurrer and answer to the bill and cross bill by the county trustee, and demurrer by complainant to the cross bill. The chancellor overruled the demurrer of the trustee to the original bill, and sustained the demurrer of complainant to the cross bill. The chancellor, being of opinion that this was a proper case to allow appeal at this stage of the case, does so in the exercise of his discretion, and the trustee has appealed, and assigns errors.

The material allegations of the original bill are as follows: The Smoky Mountain Land, Lumber & Improvement Company, a corporation under the laws of the State of Delaware, with authority to purchase and own lands, manufacture lumber, etc., owns about forty-two thousand acres of timber land in Monroe county, purchased in 1901. Since that time complainant has been

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paying the State and county taxes regularly assessed thereon at a valuation of \$106,500.

On October 15, 1906, State Revenue Agent A. S. Birdsong made motion before C. F. Lattimore, trustee of Monroe county, for the back or re-assessment of complainant's lands for taxes for the years 1903, 1904, 1905, and 1906, when the trustee made the following reassessments: For the year 1904, \$450,000; for the year 1905, \$500,000; for the year 1906, \$550,000—but refused to reassess for the year 1903.

Complainant prayed and effected an appeal from this action of the trustee to the State board of equalization in reassessing for said three years, and the revenue agent prayed an appeal from the refusal of the trustee to reassess for the year 1903.

The appeals were heard ostensibly before the State board of equalization October 29, 1906, upon copy of the proceedings and evidence had before the county trustee, and upon additional evidence and argument; counsel for both sides being present. Only one member of the State board was present, and heard the evidence and argument—John W. Morton, secretary of State. Reau E. Folk, treasurer, and Frank Dibrell, comptroller, were both sick and absent. There was present at the time a Mr. Folk, whom counsel for complainant understood to be the treasurer, but afterwards learned that he was not the treasurer, but his private secretary.

After inquiry by complainant's counsel of the secretary of State and of the trustee, he was furnished by

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the latter with a copy of the finding or judgment of the board, signed by the three members, dated December 27, 1906, from which it appears that the action of the trustee in raising the assessments for the years 1904, 1905, and 1906 was sustained, and that he was in error in failing to raise the assessments for the year 1903, and for that year the board raised the assessment to \$300,000. A penalty of fifteen per cent. is added upon the taxes so assessed for the four years.

The bill charges that complainant's lands were duly and regularly assessed for the years 1903, 1904, 1905, and 1906, which was duly passed upon by the county board of equalization. Their action was duly certified to the State board, which in turn acted thereon, and certified same back to the county, and complainant has paid the taxes thus assessed against it for these years, and it is charged that this is final, and that neither the trustee, revenue agent, nor State board can go behind this and reassess the property.

In this connection the bill charges that none of the provisions of the act (page 632, c. 258) of 1903 allowing reassessments have been violated; that said reassessments are void for this reason, and for the further reason that the reassessments are excessive and out of proportion to the assessments of other lands of like character and value in Monroe county and other counties in East Tennessee.

The prayer of the bill is as first above stated.

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The county trustee demurs and answers; the demurrer being on the following grounds:

"(1) Because the suit is brought to enjoin a judicial act of the State board of equalization, which action cannot be collaterally attacked, the same being subject to review only by appeal or *certiorari*.

"(2) The court hath no jurisdiction, because it is not sufficiently charged that the action of the State board of equalization was fraudulent, or that the said board had no jurisdiction, or that there is no adequate remedy at law.

"(3) Because *certiorari* is the only remedy of review of action of the State board of equalizers.

"(4) Because the court is without power to grant an injunction against the defendant, in so far as it applies to the assessment and collection of State taxes in accordance with the action of the State board as to such taxes. The only remedy is to pay under protest and bring suit for the recovery of the money paid.

"(5) The defendant further demurs to so much of said bill as seeks to enjoin or prohibit the collection of the State's part of the revenue due under said reassessment. This action does not lie.

"(6) This respondent further demurs to so much of the bill as seeks to attack the action of the State board of equalizers because there was not a full board present when the case was heard, because the bill shows that the questions brought before the board were brought there by this complainant, and that the complainant appear-

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ed before the board and asked a reversal of the action of the court below, and does not show any fraud on the part of the board of equalizers. Wherefore complainant is estopped to deny that the court was properly constituted."

The trustee then answers the bill, denying all allegations of fraud or irregularity in the proceedings for reassessment of the lands. It is alleged in the answer that, as soon as it was brought to the knowledge of the State board of equalization that complainant was complaining of its action in the hearing of the appeal, the board issued a notice to complainant that this appeal would be reheard by the full board on February 2, 1907. On that date the board rendered their decision and judgment. This is in the exact language of that first above set out, with the exception of the change of date from December 27, 1906, to February 2, 1907.

With these allegations, the trustee asks to file cross bill in the name of the State of Tennessee, ex rel. C. F. Lattimore, trustee, in this cause, and prays for judgment against complainant for the amount of taxes and penalties assessed by the State board, amounting to \$22,770.19 and interest.

Complainant demurs to the cross bill on the following grounds:

"(1) The State board of equalization having once acted upon the appeal from the action of C. F. Lattimore, trustee, said action was final, and said State board had no power, authority, or right in this particu-

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lar case, after final action and final disposition of the appeal, to rehear the same.

“(2) The proceedings of the trustee and State board of equalization in regard to back assessments, or reassessments, are summary in their nature, with power to adjudge penalty. The proceedings and judgment or decree must affirmatively show that the statute had been complied with, which does not appear in this case.”

Pending the argument of the demurrer to the original bill and demurrer to the cross bill, the defendant trustee asked permission to amend his cross bill so as to set out and allege the judgment of December 27, 1906, by the State board of equalization, and to pray for decree thereon. The chancellor was of opinion that there had been no valid assessment on which the trustee could rest his case under his cross bill, as proposed to be amended, and the amendment was disallowed.

The demurrer to the original bill is overruled, and the demurrer to the cross bill is sustained. Appeal is prayed by the trustee, by the State of Tennessee, and by Monroe county, which the chancellor in his discretion allows at this stage of the cause—to the State without bond, and to the trustee and Monroe county upon bond. The trustee perfects his appeal by execution of appeal bond. Errors are assigned upon the decree of the chancellor.

The questions presented by the six grounds of demurrer may be more briefly stated as follows: The

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first three grounds are to the effect that complainant's remedy is by *certiorari*. The fourth and fifth are to the effect that injunction will not lie to restrain the collection of State taxes. The sixth ground is to the effect that complainant brought the case before the State board of equalization by appeal, and, there being no fraud alleged on the part of the board, its action cannot be impeached.

It is urged on the part of defendant that the purpose of the bill is to enjoin and set aside a judicial act or judgment of the State board of equalization with reference to a matter over which said board has jurisdiction, when the bill does not charge that the judgment is fraudulent or void. In such case, the complainant's remedy is by appeal, if appeal is allowed; otherwise, by *certiorari*. The case of *Briscoe v. McMillan*, 117 Tenn., 115, 100 S. W., 111, is cited in support of this.

The bill in that case was exhibited by citizens and taxpayers of Knox county against the county trustee, the county court clerk, and the comptroller of the city of Knoxville, to enjoin said officers from assessing and collecting taxes on the property of complainants, upon the basis of an assessment made by the State board of equalization. The theory of the bill is that said assessment is illegal and void, upon the ground, among others, that no evidence was heard by the board upon which the assessment of complainant's property was raised. While the assessment on more than six hundred pieces of property was raised, the board heard proof in regard

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to only thirty of said pieces of property. It is further charged that the action of the board was substantially a raising of assessments in Knox county by a per cent. or upon an attempted per cent. valuation, and that the board did not make its findings and take such action and raise said assessments in the manner required by law, and its action is, therefore, illegal and void; further particulars to show this being alleged.

The question in this connection to be determined was whether the action of the State board was absolutely void, or whether it was merely irregular. On this subject it is said:

"If the State board had jurisdiction in the premises, and its action was only irregular, then it is well settled a court of equity would have no right to enjoin its proceedings. This proposition is based upon the assumption that the State board of equalizers, under the provisions of the act of 1903, is a court of record clothed with certain jurisdiction. It is well settled in this State that the decrees of superior courts are valid on collateral attacks, even if there are irregularities in the proceedings, if it appear in the record that the court acquired jurisdiction of the person and of the subject-matter of the suit."

On page 132 of 117 Tenn., page 116 of 100 S. W., it is said:

"It has already been seen that no allegation of fraud against the State board of equalization is made in the bill, and it affirmatively appears from the recitals of the

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bill that the State board had jurisdiction in the premises. The gravamen of the bill, when properly understood, is leveled at an alleged improper exercise of the jurisdiction of the court in the mode of raising the assessments, viz., without hearing evidence in respect of the specific pieces of property, as required by the statute.

"But, as already shown, the State board of equalizers is a *quasi* court of record, and its judgment cannot be collaterally attacked upon the ground that the board proceeded in the exercise of its jurisdiction without hearing evidence. A decree or judgment of a court of record having jurisdiction of a person and subject-matter is not void because the court pronounced said judgment without hearing evidence. The appropriate remedy of reviewing such a decree or judgment is by appeal or writ of error, or other direct proceeding. It cannot be collaterally attacked upon such a ground. The allegations of this bill, taken in their strongest light, complain merely of irregularities in the mode of procedure and noncompliance with the requirements of the statute, but do not show want of jurisdiction on the part of the board or that its action was utterly void."

In the case at bar no question is made with regard to the citation to complainant before the county trustee, prescribed by section 31, c. 258, p. 660, of the Acts of 1903; so that complainant was brought properly before the county trustee. Complainant did appear there, and appealed from his decision to the State board of equali-

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zation. The board thus had jurisdiction of the person of complainant.

It is contended, however, that the judgment of the board is illegal and void. Among the grounds insisted on is that, while complainant did appear, there was no quorum of the board present; that only one member assumed to act for the board, which fact was not at the time known to complainant. The insistence thus is that the board had not legally acted in the premises, and that the judgment afterwards signed by the three is therefore void.

By subsection 1, section 38, c. 258, p. 671, Acts of 1903, it is provided that "a majority of the board shall constitute a quorum for the transaction of business."

The board is by the act constituted a *quasi* court, a majority of whom alone is authorized to act in a particular case. The board is composed of the secretary of State, the treasurer, and comptroller, and not less than two of these can lawfully act in any cause. The complainant is cited to appear before the county trustee. There the case is heard, and appeal is taken to the State board. Complainant has the right to be present before that board, or before a legal quorum of that board. This is not merely formal. It is a right of complainant to present its defenses to a reassessment by evidence, oral or written, and by argument of counsel. Until complainant has had that opportunity before a quorum of the board, it has not had its day in court; and any judgment, signed

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though it may be by the whole board, without having been first permitted to have its case heard as required by law, is void. The hearing of the case by only one member of the board is equivalent to no hearing. The citation given to complainant in the first instance is to afford an opportunity to be heard by a legally constituted board; and the legislature did not intend that one member of the board can conduct alone the trial, hear the evidence and argument of counsel, pass upon the sufficiency of these, render judgment, and have his judgment signed by the remaining members of the board, before whom neither complainant nor his counsel have had a hearing. It was intended at least a quorum should hear the trial; otherwise, the citation to complainant to appear and make defense would be an empty, meaningless formality.

While this trial was had before only one member of the board, and complainant was represented by counsel, it is alleged that the fact that only one member was present was not at the time known to said counsel, they having been misled by the presence of the secretary or the treasurer, of the same name, who was thought to be the treasurer himself, and the trial was conducted throughout under that belief. While no fraud is charged in this particular, we think the allegations of the bill on the subject sufficient to excuse complainant from the necessity of interposing objection to the jurisdiction of the one member, if, indeed, objection had been necessary. If one member did not have jurisdic-

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tion, failure to object would not necessarily confer jurisdiction.

That complainant should have the full benefit of a trial before a quorum of the board is obviously just, in view of the facts that its lands had been regularly assessed in the regular way by the tax assessors for the four years in question, the assessments had been passed by the county board of equalization, and certified to by the State board, which, in turn, acted thereon and certified back to the county, and in accordance with the assessments thus fixed complainant has already paid the taxes as assessed from year to year. In addition to these, when the reassessment is properly made, the act provides for the payment of a penalty of fifteen per cent. on the reassessment. Under all these circumstances, complainant is entitled to a full hearing by a legally constituted board before it can be subjected to such burdens; and this is especially true, since there is no charge in the cross bill that complainant is in any default for the failure of the authorities to properly assess the lands in the first instance.

In *Cowan v. Murch*, 97 Tenn., 590, 37 S. W., 393, 34 L. R. A., 538, it is held that the decision by two judges of the court of chancery appeals is legal and binding, though not participated in by the third; but the case must be heard by at least two. That case cites *Sutherland on Statutory Construction*, section 390, where it is said:

“When any number of persons are appointed to act

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judicially in a public matter, they must all confer, though a majority may decide."

There is cited, also, *Crocker v. Crane*, 21 Wend. (N. Y.), 211, 34 Am. Dec., 228, which was a case where commissioners were authorized to distribute stock in a corporation for its best interests. In that case it is said:

"It has long been perfectly well settled that when a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may decide."

In *Carroll v. Alsup*, 107 Tenn., 260, 64 S. W., 193, two members of the State board of equalization were present and heard the case. The fact that a third person was present, proposing to act for the absent member of the board, is held not to vitiate the judgment, since two constituted a quorum.

It results that the judgment of the board, dated December 27, 1906, under the circumstances above stated, is void, and the bill was properly filed to enjoin it.

The trustee files cross bill in the case, alleging that, after the first judgment had been signed and the board had learned of complainant's objection to it, notice was given to complainant that the matter would be reopened by the board and the appeal heard and determined by the full board on February 2, 1907. Complainant failing to appear in response to said notice, another

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judgment was rendered in the exact language of the former judgment, with change of date only. This was done after the bill in this cause was filed, January 14, 1907.

As the former judgment was void, the appeal remained pending before the board as before, and the board, upon proper notice to complainant, had jurisdiction to reopen the case and render judgment or finding by the full board.

The board having jurisdiction of the person and subject-matter, this judgment of reassessment is not subject to collateral attack for alleged irregularities, such as that it was unjust, based on no evidence, or not sufficient evidence; nor is it subject to collateral attack on the ground that complainant has violated none of the provisions of the act of 1903, upon which reassessments can be made. This latter is a jurisdictional fact to be determined by the board from the evidence before it; and the question as to whether it had this evidence is to be determined by the board. These matters can be reviewed only on *certiorari*.

The facts that the property had been regularly assessed in the first instance, the assessments passed upon by the county board of equalization, in turn, by the State board, and by it certified back to the county, and taxes paid by complainant, will not prevent a reassessment in a proper case.

The result of the holding in this case is that the original bill is properly filed, and the demurrer thereto

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is overruled. The demurrer to the cross bill is also overruled, and the cause is remanded to the chancery court for further proceedings in accordance with this opinion.

The costs of appeal will be paid one-half by complainant and one-half by defendant.

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STATE OF TENNESSEE v. GEORGE D. LANCASTER, *Exr.*,
*et al.**

(Knoxville. September Term, 1907.)

1. **WILLS.** Executed by a person of unsound mind, or procured by undue influence, is void; when determined by court.

A will executed by an insane person or by a person of insufficient mental capacity, or a will procured by undue influence, is not merely voidable, but void; but the fact of unsoundness of mind must be determined by a court in a proper proceeding. (*Post*, p. 651.)

Case cited and distinguished: McDowell v. Morrell, 5 Lea, 278, 286.

2. **SAME.** Probate in solemn form can only be set aside upon a bill for fraud.

When a will has been probated in solemn form, no question of its invalidity can thereafter be raised, except by a bill filed to set aside the judgment for fraud in its procurement, as any other judgment may be set aside. (*Post*, p. 651.)

Case cited and approved: Keith v. Alger, 114 Tenn., 1.

3. **SAME.** Probate in common form can only be set aside for fraud or upon issue of *devisavit vel non*.

When a will has been probated in common form only, it is good as to all the world so long as the probate stands, and no question of its invalidity can be raised, except by a bill to set aside the judgment for fraud in its procurement, or by an issue of *devisavit vel non*. (*Post*, pp. 651, 652.)

Case cited and approved: Reeves v. Hager, 101 Tenn., 712, 718-722.

*As to conclusiveness of probate of will, see note to Sly v. Hunt, 21 L. R. A., 680.

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4. **SAME.** Title acquired under will probated in common form is not affected by setting will aside, when.

Title acquired in good faith under a will probated in common form cannot be disturbed, even if subsequently the probate be annulled, and the will set aside. (*Post*, p. 652.)

Case cited and approved: *Reeves v. Hager*, 101 Tenn., 712, 718-722.

5. **SAME.** Bill in chancery by State for escheat, and to stay proceedings until contest of will can be made in regular way.

The State may institute suit in the chancery court to have property conveyed and disposed of by a fraudulent will, that is, one executed by a person of insufficient capacity, or procured by undue influence, escheated to the State, and to obtain a stay of the suit and the proceedings, until a contest of the will to be directed by the chancellor, can be instituted in the county court, and carried to the circuit court, and conducted and determined in the regular way. (*Post*, pp. 643, 652-658.)

Code cited and construed: Sec. 3826 (S.); sec. 2962 (M. & V.); sec. 2144a (T. & S.).

Cases cited and approved: *Bank v. Nelson*, 3 Head, 635, 636; *Simmons v. Leonard*, 89 Tenn., 623; *in re Broderick's Will*, 21 Wall. (U. S.), 503, 509.

Cases cited and disapproved: *State v. Allen*, 2 Tenn. Chy., 42; *Louisiana v. Ames*, 23 La. Ann., 69; *Hop v. State*, 72 Tex., 281, 287.

6. **SAME.** State claiming an escheat may contest a will for fraud in procuring its execution.

While ordinarily only those directly interested as heirs or distributees in the estate can contest a will, yet third persons claiming an interest in the property, and the State claiming an escheat, may contest the will in the county and circuit courts on the ground of fraud, as where its execution was procured from one of unsound mind or by undue influence. (*Post*, pp. 643, 654-658.)

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Cases cited, approved and distinguished: Gore v. Howard, 94 Tenn., 577; Ligon v. Hawkes, 110 Tenn., 514, 520; Bowers v. McGavock, 114 Tenn., 438.

7. **SAME.** Same. Contested for fraud in suit in chancery by State for escheat of the property, when.

In a suit about property held under a will probated in common form, the will may be attacked by the opposing party for fraud in its procurement; and, therefore, in a suit in chancery by the State for the escheat of property, alleged to have been disposed of by will probated in common form, the court has jurisdiction of the question whether the will was procured by fraud or by undue influence from a person of unsound mind, and if the will is found to have been thus procured, it may be declared ineffective as to the property in controversy, and all the rights pertaining to the property and persons involved may be adjudicated upon the merits in such suit, without directing a contest to be made in the regular course. (*Post*, pp. 643, 658-662.

Code cited and construed: Secs. 3929-3932 (S.); secs. 3037-3040 (M. & V.); secs. 2197-2200 (T. & S. and 1858).

Acts cited and construed: Acts 1784, ch. 10, sec. 6.

Case cited and approved: Weatherhead v. Sewell, 9 Humph., 271, 280, 281, 282, 301.

8. **SAME.** Suit for escheat against personal representative holding proceeds, and not against the purchasers of the property.

A suit in chancery by the State to have property conveyed by a fraudulent will declared escheated to the State is properly brought against the personal representative in possession of the proceeds of the property sold, instead of the purchasers of the property. (*Post*, pp. 643, 644, 652, 662.)

Case cited and approved: Reeves v. Hager, 101 Tenn., 712, 718-722.

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FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.
—T. M. McCONNELL, Chancellor.

ATTORNEY-GENERAL CATES, DISTRICT ATTORNEY WHITTAKER, BROWN & SPURLOCK, and T. C. LATTIMORE, for State.

A. W. GAINES and PRITCHARD & SIZER, for defendants.

MR. JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed for the purpose of having certain property declared escheat to the State, but was dismissed on demurrer, from which decree the complainant prayed and obtained an appeal to this court.

The bill alleges that one Ella C. White died in Hamilton county about December 25, 1904, without issue, and without any relatives entitled by the laws of descent to inherit the estate of which she died seized and possessed; that she owned at her death eight pieces of real estate specially mentioned in the bill, and also certain personal property described in the inventory of her estate filed by the defendant George D. Lancaster, as executor.

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It is further alleged that about a month before her death Mrs. Ella C. White executed a will wherein the said George D. Lancaster was nominated as executor, and in this will she disposed of her estate in the following manner:

To each of the defendants Dr. H. Berlin, Rev. Thos. W. Tobin, Mrs. C. V. Brown, and her children, Edith Brown and Benjamin Brown, she gave certain sums of money, and the residue of her estate to defendant the Sisters of St. Dominick, and authorized the executor to sell and dispose of all of the estate and distribute the proceeds among the parties just mentioned.

It is further alleged that at the time this will was executed the testatrix was not of sound mind and disposing memory, and that the will was also procured from her by undue influence, and was without effect to convey title; that the said will was, however, probated in common form; and that the executor therein named took out letters testamentary, and has since been engaged in the administration of the estate, and has sold and reduced to money the greater portion, if not all, of the estate, and now has the proceeds in his hands ready for distribution under, and in accordance with, the terms of the will.

It is further alleged that the defendants Mrs. Bridget M. Brosnon, John W. White, Mrs. Ella T. McDermott, Julia Kerney, Katherine Kerney, Arthur W. White, Mrs. Ella McHale Fineran, Edward McHale, Thomas McHale, William McHale, and Joe McHale are the broth-

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ers and sisters, nephews and nieces, respectively, of William P. White, the husband of the said Ella C. White, who predeceased his wife; that as such nephews and nieces of William P. White they are setting up claim to said property by virtue of some alleged will executed in their favor by said Ella C. White. Complainant charges that, if any such will was in fact executed, the said Ella C. White was of unsound mind, and that the same was procured by undue influence.

The bill prayed for process for the persons mentioned, and that the title of the property not disposed of be decreed to the complainant, and also the proceeds of that disposed of. The defendants who are described above as the nephews and nieces of William P. White filed a demurrer setting forth the following objections to the bill:

First, that the bill alleges the fact that Mrs White died testate, and this allegation could not be avoided by the further allegation that she was mentally incapable at the time the will was executed, or was under the effect of undue influence; second, that it appears from the face of the bill that it is a proceeding to contest a will, whereas, the court of chancery has no power to entertain such a controversy, and the complainant no right to institute one; third, because the bill seeks to reach the proceeds of the sales in the hands of the executor, while complainant's recourse, if any it has, is against the property itself, left by the decedent, and that

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the present holders of the property which has been sold are not made parties to the suit.

The demurrer was incorporated in the answer, but was first called to the attention of the court, and in the view we take of the case it is unnecessary to consider the questions made upon the answer.

An answer was filed by George D. Lancaster and Dr. H. Berlin and other persons mentioned with him, but no question arises upon this branch of the case. The bill having been dismissed on demurrer, the question is simply whether a cause of action is stated upon the face of the bill.

Our statutory provisions upon the law of escheats are contained in sections 3825 to 3837, inclusive, of Shannon's Code. These provisions, so far as necessary to be quoted in order to give a general view of the subject, are as follows:

Section 3825 provides that "the estate, real and personal, of any person dying intestate within this State, without issue, and leaving no relatives entitled by the law of descent to his estate, shall go to the common school fund." A subsequent part of this section contains a provision in favor of the widow which need not be specially mentioned here.

Section 3826 reads: "It shall be the duty of the district attorney in all cases in which he has a good right to believe an escheat has occurred in his district, to file a bill in the chancery court of the county wherein the land so escheated may lie, in the name of the State of

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Tennessee, and without security, to have the same declared escheated."

Section 3827: "Besides the State of Tennessee as complainant, said attorney shall make parties defendant to said bill the personal representatives of the deceased, and all other persons who are in possession, or in any manner or way claim an interest in or to such property; and if such parties are residents of the State of Tennessee, they shall be served with process; if non-residents, shall be made parties by publication, according to law."

The next section provides that, in addition to the classes of defendants just named, there shall be made a publication for thirty days in a newspaper published in the county, or if no newspaper be published in the county, then the nearest newspaper so published, calling upon unknown heirs of such deceased person, "and all persons claiming under him or her in any manner or way whatever, to enter his, her or their appearance as defendants to said bill or suit, and all persons having an interest in the same may come into court and defend the same according to the rules of said court."

The next section concerns the fee of the district attorney.

The next section provides that the same proceedings shall be instituted against the personal representative and his sureties, after the lapse of two years, for any balance of personal estate in his possession, and upon the same terms and conditions as those above men-

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tioned, as well as against any other person having possession of or claiming the same.

Section 3831 provides that the court shall hear proof, and, if satisfied that it would be best for said land to be sold, shall decree the sale thereof by the clerk.

The next three sections provide the terms of sale, and declare the duties of the clerk with respect to collections.

Section 3835 declares that when all the money is paid the court shall vest the title of the land in the purchaser by decree.

Section 3836 reads: "All moneys or lands so declared escheated or belonging to the State shall, if money, be paid to the treasurer of the State, who shall report the same to the next legislature thereafter; or if lands, and the court should not decree a sale of the same, the said district attorney shall, in writing, report the same to the comptroller, whose duty it shall be to report the same to the next legislature thereafter."

The next and last section provides for the right of appeal to this court.

We have several cases upon the subject of escheat in this State (*Williams v. Wilson*, Mart. & Y., 248; *Pinson v. Ivey*, 1 Yerg., 296; *Hinkle's Lessee v. Shadden*, 2 Swan, 46; *Puckett v. State*, 1 Sneed, 355; *Catham v. State*, 2 Head, 553; *Parchman v. Charlton*, 1 Cold., 380, 388; *Garretson v. Brien*, 3 Heisk., 534; *Baker v. Shy*, 9 Heisk., 91; *State v. Allen*, 2 Tenn. Ch., 42; *Box v. Lanier*, 112 Tenn., 393, 79 S. W., 1042, 64 L. R. A.,

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458; *State v. Unknown Heirs*, 113 Tenn., 298, 86 S. W., 717), but it will be necessary for us to refer specially to only a few of these cases, as bearing upon the particular phase of the question presented in the present controversy.

In *Hinkle's Lessee v. Shadden*, supra, it is said: "By a well-established principle of the common law, of feudal origin and policy, whenever the blood of the person last seized became extinct, and the title of the tenant in fee failed, from want of heirs or other cause, the land escheated, or reverted to the original grantor, or lord of the fee, from whom it proceeded. And although feudal tenures do not exist in this country, yet it is a well-established principle of American jurisprudence that, when the title to land fails from defect of heirs, the State steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction."

It was further said in that case that whenever the owner dies intestate, without leaving any inheritable blood, there is a failure of competent heirs, "and the lands vest immediately in the State by operation of law, and no inquest of office is requisite in such cases."

To the same effect is *Puckett v. State*, supra.

In *Williams v. Wilson* it was held that, where property subject to escheat was conveyed to a person who could not at that time take in law (an alien), nevertheless such person would have the right to hold, and that his conveyance would be good, until proceeded

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against by the State, for the purpose of having an escheat declared, and that such conveyance would be subject to be defeated by the assertion of the right of the State, at any time it might see fit to proceed.

In *Catham v. State*, supra, it was held that the State must maintain in the proof the predicate on which it bases the escheat; that is, the death without issue, and the fact that there are no relations to take.

In *State v. Unknown Heirs*, supra, it was held that the fact that the decedent left a will was of no importance where the will directed the property to be disposed of as the law directs. It further appeared that the decedent died without issue and without any relatives capable of taking; therefore that the will directed simply what the law would direct, viz., that the State should take the property by escheat.

In *State v. Allen*, it appeared that there was a bill filed to have declared escheated the property of one William Downs. During the course of the investigation there was developed a paper writing purporting to be the will of the decedent, and that this instrument had been probated in common form in the county court. Speaking to this matter, the chancellor said that there could be no doubt that the sections of the Code above quoted were intended to simplify the proceedings touching escheated estates, and to give to the court of chancery jurisdiction of all suits brought in the name of the State to recover property of that character; that the object of the legislature was to confine the litigation as

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much as possible to a single suit, and for this purpose to clothe the chancery court with plenary power to bind all parties, and to enable it to settle in one suit the rights of all claimants. It was further said that it did not necessarily follow that the chancellor should dispose of every possible question which might arise between the State and the various claimants in the ordinary mode, nor at one hearing; that there might be an issue made up to try some hotly contested fact turning upon the credibility of witnesses, or upon a large mass of conflicting evidence, and sent to a court of law for trial, or submitted to a jury to be impaneled in the chancery court; that there might be, also, other subsidiary litigations looking to the general result; that all the act required was that the suit in the chancery court should be the common nucleus of the litigation, and that the chancellor should control it in all its details, and, finally, by decree, settle the rights of all parties. It was further said that, even if the sections of the Code above set out did not confer upon the chancery court the right to try an issue of *devisavit vel non*, nor deprive the circuit court of its exclusive jurisdiction over such issues, there was nothing to prevent the court, if it should become necessary in the exercise of the jurisdiction conferred by the sections mentioned, from making up the issue and sending it to the circuit court for trial; that the chancery court had, under the sections of the Code referred to, general jurisdiction of the State's claim to escheated estates; and that the mere fact that one of the claimants

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relied upon a forged will could not oust the jurisdiction, although it might control the mode of its exercise. The chancellor continued: "It may not be improper for me to add that if it becomes necessary, as I think it will, to make up an issue of *devisavit vel non* in this case, I am of opinion, at present, that it will be my duty to send it to the circuit court for trial, because the circuit court is by statute, sustained by the uniform current of decision, the proper court for the probate of a will in solemn form, because its machinery is more perfect for the proper trial of such an issue than the machinery of this court, and because its decision is binding on all the world."

There is a note at the end of the case to the effect that the suggestion contained in the words just quoted was adopted, and an issue of *devisavit vel non* was made up and transmitted to the circuit court for trial, and there tried; the finding being in favor of the will.

The foregoing contains the substance of the authorities in this State, so far as they have any bearing upon the present controversy.

We shall now address ourselves especially to the questions made on demurrer, and in doing so we shall consider the first and second grounds together.

Assuming for the present that there is some method by which the State could remove the apparent obstruction of a will procured from a person *non compos mentis* whose property but for the will would be escheated to the State, we proceed to inquire whether the State has

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the right, or a standing, to question such will. This is the point raised by the first ground of demurrer.

It is insisted that a will procured from an insane person is not void, but merely voidable, and that, so long as it remains unquestioned by some one claiming under the deceased, it must stand; that the State does not claim as heir or in any other way, under the deceased, but in an independent right as sovereign, and cannot therefore raise the controversy. We are referred, by way of analogy, to the authorities which hold that contracts by persons of unsound mind are not void, but only voidable. *McDowell v. Morrell*, 5 Lea, 278, 286; 29 Am. & Eng. Encyc. of Law (2d Ed.), 1071. We do not however, think that the distinction referred to can be properly said to apply to wills. A will is either good or bad. If it fail to comply with the legal prerequisites that are held vital to its form, or if the supposed testator had not sufficient mental capacity to make it, or it had been procured by undue influence, it is in either event a void paper; but the result can be determined only by a court. The paper is of no legal force, until it is probated, and it will not be probated, in solemn form, at least, unless it has the essentials of form, and unless the supposed testator had testamentary capacity. When it has been probated in solemn form, no question of validity or invalidity can be thereafter raised, except upon a bill filed to set aside the judgment for fraud in its procurement, as any other judgment may be set aside. *Keith v. Alger*, 114 Tenn., 1, 85 S. W., 71. And even

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when it has been probated in common form only, so long as the probate stands, it is good as to all the world, and can be questioned only in the manner just stated, or on an issue of *devisavit vel non*, and title acquired under it in good faith, while so standing, cannot be disturbed, even if the probate be subsequently annulled, and the will set aside on an issue of *devisavit vel non*. *Reeves v. Hager*, 101 Tenn., 712, 718-722, 50 S. W., 760.

The question then comes down to this: The State insists that the title to certain property has been cast upon it, or has reverted to it, by operation of law, at the moment of the death of a named decedent. A rival claimant insists that the title was devolved upon him by the will of the deceased, subsequently probated in common form. The State admits that, if the will is a valid instrument, it constitutes an insuperable barrier to its claim for the property, but insists that the will is a void paper. Can any sound or even plausible reason be suggested why the State should not be permitted to make the question and have its rights determined? Is it possible that the law is so narrow in its field of operation, and so feeble in power, that the State's right of escheat can be defeated by the devices of one who obtains a will from an insane person? Must the court hold that it is a sufficient answer to the State's demand that it was deprived of its right by fraud? Since when has fraud attained the dignity of a legal defense? How long has it been the policy of the law to permit the estates of insane persons to become the prey of designing men, and booty

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to the first marauder? Does it say to the designing persons: "You can attack and carry away without fear of interruption, because there are no kin to check you and the State itself is powerless to resist you?"

We do not wish to be understood as intimating that the proof in this case, when heard, will show a state of facts so dark as just intimated might be shown in some cases; but we put the controversy in the strongest light in order to illustrate the principle. We think there is no doubt that the State has the right to test the question, but how can it be done?

Counsel for the defendants, in the very able brief filed, attack the method of practice laid down in *State v. Allen*, supra, as manifestly improper, because, even if the right exist to make a contest, it would have to begin in the county court, under the decisions of this court, and could not be initiated by an issue sent from the chancery court directly to the circuit court. The argument is that the circuit court has no means under the law of obtaining jurisdiction of such a controversy except by certification of the will from the county court on a contest instituted there, and that the chancery court could not confer this jurisdiction upon it by merely sending down an issue. We think this is the correct view of the matter; but there could be no objection to the chancellor staying the trial of the suit brought for escheat, until the proper proceedings could be instituted in the county court, and thence carried to the circuit court, and a contest thus instituted and carried

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forward in the regular way. This was the course pursued in *Simmons v. Leonard*, 89 Tenn., 623, 15 S. W., 444, as appears from the first paragraph of the opinion of the court in that case, and seems to us a convenient and unobjectionable practice; and the same course was recognized or suggested in *Bank v. Nelson*, 3 Head, 635, 636.

It is true no case has arisen in this State wherein it was necessary to determine whether the State could make a contest for the purpose of removing an obstruction to its right of escheat.

We have numerous cases upon the subject of the contest of wills, involving both the question of the personnel of the contestant, and the form of practice; among other points the settlement in the county court of the preliminary question of the right to contest. *Burrow v. Ragland*, 6 Humph., 481; *Wynne v. Spiers*, 7 Humph., 394; *Cornwell v. Cornwell*, 11 Humph., 485; *Bank v. Nelson*, 3 Head, 634; *Keith v. Raglan*, 1 Cold., 473, 477; *Townsend v. Townsend*, 4 Cold., 84, 94 Am. Dec., 185; *Townsend v. Bonner*, 1 Tenn. Cas., 198; *Miller v. Miller*, 5 Heisk., 730; *Harrison v. Guion*, 4 Lea, 531; *Moore v. Johnson*, 7 Lea, 584; *Roberts v. McMillan*, 9 Lea, 573; *Wisener v. Maupin*, 2 Baxt., 349; *Gore v. Howard*, 94 Tenn., 577, 30 S. W., 730; *Crocker v. Balch*, 104 Tenn., 6, 55 S. W., 307; *Ligon v. Hawkes*, 110 Tenn., 514, 520, 75 S. W., 1072; *Bowers v. McGavock*, 114 Tenn., 438, 85 S. W., 893; *Cowan v. Walker*, 117 Tenn., 135, 96 S. W., 967. As already stated, the question of the State's

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right to make a contest has never arisen. It is insisted that the right must be given by statute, but this is a mistaken view. The statute does not settle the question at all. The general criterion laid down in the cases is that the person who contests must be some one who has an interest at the death of the testator, and who would obtain a benefit by the fact of intestacy. It has been held that an heir apparent who has released his expectancy cannot contest, nor a creditor of an heir, nor a grandson of a testator, it not appearing that his father was dead, nor a son-in-law who was the father of a devisee, nor the next of kin of a devisee, nor the next of kin himself in the face of a prior valid will in which he was excluded. In these several cases, we see the underlying principle just announced; but we are referred to *Gore v. Howard*, supra, wherein it is said that one who would take nothing under the statute of distributions, if there were no will, cannot contest it; and the same language is used in *Bowers v. McGavock*, supra, and in *Ligon v. Hawkes*, wherein it is said that the general rule in Tennessee is that only those will be allowed to contest the validity of a will who are directly interested as heir or distributee in the estate. But in the cases last cited the court did not have in mind the question before us at this time, nor could it have been intended to preclude such an inquiry. Decisions must be construed in the light of the question with which the court is dealing, and of the facts before the court. Aside from the general underlying rule which we have deduced from

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our cases, there is to be found the strongest ground in the very nature of the inquiry.

In discussing the rule that courts of equity will not entertain bills to set aside a will on the ground of fraud and imposition, it is said, by Mr. Justice Bradley, in *Re Broderick's Will*, 21 Wall (U. S.), 503, 509, 22 L. Ed., 599:

“Whatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground of its continued prevalence is that the constitution of a succession to a deceased person's estate partakes, in some degrees, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res adjudicata* by the decision of the court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers

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which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give free and adequate relief."

It would certainly be an anomaly if there were not vested somewhere in the machinery of the courts a power to accomplish the result indicated—that is, to question a fraudulent will where that fraudulent act stood in the way of the enjoyment of the right of a third party to the same property—and since it does not reside in the chancery courts in general, persons who have such an interest as above indicated must be permitted to resort to the probate court, and there make contest.

We are referred to the cases of *State of Louisiana v. Ames*, 23 La. Ann., 69, and *Hopf v. State*, 72 Tex., 281, 287, 10 S. W., 589, as being opposed to the conclusion just announced. An examination of these cases, however, discovers that they are not in opposition. In *State v. Ames*, it was merely decided that the State was not entitled to notice as an heir, but the right to maintain the contest was in substance upheld, since the various grounds which were advanced by the State for setting aside the will were fully considered and disposed of. These grounds were: First, that the order for the registry and execution of the will was rendered *ex parte* without notice to the State; secondly, on insufficient

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evidence; and, thirdly, that the will was spurious and forged. The court held that the State was not entitled to notice of the probate, but, as stated, proceeded to dispose of the case upon the other two grounds as to the insufficiency of the evidence, and as to the validity of the instrument itself. In the Texas case there was no formal contest instituted by the State. The district attorney, it is true, appeared, during the probate proceedings, and, in the name of the State, filed a protest against the probate. The court held upon the evidence offered that the will was properly admitted to probate. As to the intervention of the State, the court intimated that no reasons were shown for such intervention, and held that an escheat could not be declared in a proceeding to probate a will.

Whether the State could institute a contest without first appearing in the court of chancery to have its right of escheat declared may well be doubted, since the sections of the Code which we have previously set out indicate that the rights of the State must be presented in chancery. But having presented its rights there, and the obstacle being stated, arising out of the existence of a will made by an insane person, we see no objection to a stay of proceedings until such a contest can be instituted and decided, and a direction on the part of the chancellor to the district attorney to institute such contest.

However, there is another view of the matter which would seem to render a contest unnecessary. This view is

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based on the rule laid down in *Weatherheard v. Sewell*, 9 Humph., 271, 280, 281, 282, 301. That was an ejectment suit. The plaintiff claimed title under the will of Anthony Bledsoe, which had been admitted to probate in common form in Sumner county. The defendant offered evidence for the purpose of showing that the will was procured by fraud. This evidence was objected to. The court held that the evidence was competent; that prior to Acts 1784, N. C., ch. 10, section 6, which now appears in sections 3929 to 3932, inclusive, of Shannon's Code, it was customary to require the production of the original will in court under such circumstances, and to require its proof, but that the statute referred to made the probate *prima facie* evidence of the will, yet that the opposing party might introduce evidence in the case on trial, for the purpose of showing that the will was procured by fraud. Said the court:

"Now, what change has this statute wrought upon the common law in relation to this subject as it existed anterior to its passage? It has made a probate of the will in the county court sufficient testimony of the devise of real estate, and attested copies evidence in the same manner as the originals. We have seen that, previous to the statute, the original, if in existence, had to be procured, and, when produced, it had to be proven; but now an attested copy may be substituted in the place of the original, and be read upon the probate in the county court. Suppose this done. In what position do the parties then stand? In the same that they would

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have stood provided the original will had been produced and proven as is required by the common law; that is, the party claiming under the will has made out his case *prima facie*, and those claiming against the will are put upon their defense to show that it is no will, or that the party producing it takes no interest under it. The only difference, then, is that an attested copy of the will, with the probate in the county court, is substituted in the place of the original will and proof in open court, *per testes*. But it was never intended that such attested copy, with the probate in the county court, should be conclusive, as is the probate of a will of personal property, *per testes*, in solemn form, in the courts having jurisdiction of such probates; that being looked upon as a proceeding *in rem*.

"The proviso to the statute was intended for the protection of those contesting the will, in order to give them the benefit of any internal evidence upon the face of the will tending to show that a fraud had been committed in the drawing or obtaining it, or that there was any irregularity in the execution or attestation thereof. Then we hold upon this point that where a will of real estate has been proven in common form, and registered in the county court, an attested copy thereof is competent proof, *prima facie*, for any person claiming an interest under it, in any suit pending at law in relation to land devised by it; that the defendant may attack the validity of such will, and the rights of those claiming under it, as well and to the same extent where

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an attested copy is relied upon as where the original is produced and proven in common law form upon the trial; and that the person resisting the claim under the will is entitled to the production of the original if it be in existence, and he thinks it will facilitate his defense; but, before he can ask for this, he must suggest that a fraud has been committed in the drawing or obtaining the will, or that there is some irregularity in the execution or attestation thereof.

"Then the court committed no error in hearing proof on the part of the defense in this case attacking the validity of the will, and the rights of the lessor of the plaintiff under it, provided the proof be legal, the reception of which was warranted by the law of evidence." *Id.*, 281, 282.

The rule thus announced is an exception to the general rule that the integrity of a will cannot be questioned unless a contest be first instituted in the county court, and thence carried in the regular way through the circuit court. It appears from the authority just cited that where there is a litigation over specific property, in a case brought for the purpose, and either party claims under a will probated only in common form, and the other interposes as an objection to the will that it was procured by fraud, this question may be made in the case itself.

Therefore, in the present case, in a litigation over the property involved, it appearing that the will has only been probated in common form, the chancery court has

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jurisdiction as incidental to the decision of the question of the right of property to consider and dispose of the question whether the will was procured by fraud—that is, from a person who was insane and incapable of executing it—or by the exercise of undue influence on such person, and if the facts are found in favor of these contentions, then it has power to declare the will ineffective as to the particular property and persons involved, and to adjudicate the rights of the parties in all respects as pertaining to the property.

The third ground of demurrer makes the point that the bill should have been filed against the persons to whom the property had been sold; rather than against the administrator in whose hands the proceeds are found. This was an incorrect view, as fully shown in the case of *Reeves v. Hager*, supra.

It results that the judgment of the court below, dismissing the bill, must be reversed, and the cause remanded to the chancery court for trial upon the merits. The demurrants will pay the costs of the appeal.

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PETER TURNER v. STATE.

(Knoxville. September Term, 1907.)

1. **MURDER IN THE FIRST DEGREE.** Evidence sufficient to sustain a conviction.

Evidence stated and held sufficient to sustain a conviction of murder in the first degree.

2. **SAME.** Killing at request of deceased is.

One who kills another at his request or command is guilty of murder in the first degree. (*Post*, p. 671.)

3. **SAME.** Express malice toward deceased is not necessary.

Express malice, in the sense of hatred or malevolence toward the deceased, need not be shown in order to support a verdict of murder in the first degree. (*Post*, pp. 671-675.)

Cases cited and approved: Dale v. State, 10 Yerg., 551; Swan v. State, 4 Humph., 136; Bratton v. State, 10 Humph., 108; Lewis v. State, 3 Head, 148; Warren v. State, 4 Cold., 130.

4. **SAME.** No reversal for insanity not shown otherwise than by the enormity of the offense, when.

In a prosecution for murder in the first degree, committed pursuant to an agreement that the defendant was to kill the deceased and then himself, where there was evidence showing that the defendant was a man of intelligence and some education, and no evidence of hereditary insanity, or previous acts tending to show an unbalanced mind, a verdict of guilty will not be disturbed by the supreme court on the ground that defendant was insane when he committed the act. (*Post*, pp. 675-676.)

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FROM KNOX

Appeal in error from the Criminal Court of Knox County.—D. D. ANDERSON, Judge.

FRANK SANDERS and J. ARTHUR ATCHLEY, for Turner.

ATTORNEY-GENERAL CATES for State.

MR. JUSTICE MCALISTER delivered the opinion of the Court.

The prisoner was convicted of the crime of murder in the first degree for the unlawful killing of one Minnie Scott, and was sentenced to hang. The killing occurred in East Knoxville, at the corner of Lithgow street and Church avenue, about 7 o'clock in the evening of March 15, 1907. The deceased was the wife of one W. B. Scott. The plaintiff in error was unmarried. The parties are all negroes. At the time and place stated persons living in that vicinity were attracted by the discharge of a pistol three or four times in rapid succession. An examination revealed the dead body of the woman, Minnie Scott, with three pistol wounds on her person—one in the mouth, one in her breast, and the third wound in her abdomen. Shortly after the discovery of the

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dead body of the woman, the prisoner, Peter Turner, appeared at his boarding house somewhere in that vicinity and stated to Charles Cheatham, colored, that he had killed Minnie Scott. He stated that he and Minnie Scott had been lovers, and for several months past had agreed to die together; that he was to kill Minnie, and then kill himself. He said he had met her that night at the corner of Lithgow street and Church avenue, when he shot her. He stated that he first shot her through the mouth, and that she said, "Shoot me again, here" (holding her hand to her abdomen), whereupon he shot her again, when she said, "Shoot me again, here" (placing her hand on her breast), when he shot her a third time, and she sank down on the ground. Defendant further stated that he knew people would be attracted by the shooting and find him there, and so he ran away, coming to his room from the place of the shooting.

To another witness, Pat Campbell, witness stated that he had shot Minnie Scott; that they had been sweethearts for a long time, and several months ago agreed that they would die together. He stated that after he killed Minnie he was about to break and reload his pistol for the purpose of shooting himself; that his heart failed him, and he could not shoot himself, and, seeing a white woman coming down the street, he ran away. Defendant also stated to this witness that at the time of the killing he was drinking, and would not have shot the woman had he not been overbalanced with whisky.

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At a subsequent time the prisoner, in a conversation with Sheriff Reeder, stated that he shot the woman three times and that she fell to the ground, and when he came to shoot himself his heart failed him and he could not do it. On another occasion he stated to Sheriff Reeder that for a long time he and Minnie Scott had had an understanding that they would die together—kill each other—and that on the night in question they had met for the purpose of carrying out that agreement, when he had killed Minnie, shooting her three times, and then undertook to kill himself, but that his pistol snapped, and that is the reason he did not shoot himself.

While in jail the prisoner was searched by the sheriff, who found on his person some match heads broken up and a few dead spiders, all wrapped up together, indicating further preparation to take his life.

It does not appear that there had been any inimical feelings between the prisoner and the deceased, nor is any motive shown for the killing, unless it was in pursuance of a compact entered into between the parties by which they had resolved on mutual self-destruction. It does appear from the testimony of a negress named Hall that about six months before the killing the deceased and the prisoner were at her house and were left alone in the kitchen. While in the kitchen a pistol was fired, and the Scott woman was shot in the face. There was no eyewitness to this shooting, and, while some suspicion attached to the prisoner, he was not charged by the woman with the commission of it, nor was he ever prose-

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cuted or arrested on that charge. The prisoner, in a written confession of the crime, claimed that the woman fired the shot herself with a pistol that she had on her person, and that he at the time tried to dissuade her from the act and prevent it, but that in struggling for the pistol she succeeded in pulling the trigger, and the pistol was discharged, inflicting the wound in her face.

The record reveals that very soon after the shooting the prisoner went to Middlesboro, where he remained about a week and returned to Knoxville, when he was arrested. When approached by the officer he denied his identity and assumed a fictitious name; but the officer reminded him that he had known him for a long time, whereupon the prisoner admitted that he was Peter Turner. It appears from the testimony of the officer that when he arrested the prisoner he found on his person, among other things, what purported to be a history of the prisoner's relations with the woman, Minnie Scott, together with a complete confession of the killing. This is quite a lengthy document, and is shown to have been written by the prisoner. The substance of this confession is that he had known the deceased for about four years, and that he was accustomed to see her almost daily; that he was very much attached to her, and she to him; that during the four years of their acquaintance there had been no trouble between them. He states that on March 13th, two days prior to the killing, they went together to a certain room for the purpose of carrying into execution their mutual agreement for self-destruction.

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tion, but that his nerve failed him. He claims in this statement that he would not have carried it into execution on the Friday night if he had not been overbalanced with whisky, and in this connection he stated that the woman at the time was also under the influence of whisky. The purport of the letter is that things had come to such a crisis that they could not continue their intimacy without the knowledge of the woman's husband, and that the woman had expressed a preference for death rather than to live without him, and that he had expressed to her the same sentiment. He further states that the woman had repeatedly begged him to kill her, and on one occasion said to him, "Jack, you have lied to me so much, until I hate to make you lie any more," referring to his failure to carry his promise to kill her into execution.

The prisoner then gives this account of the shooting of the woman at the house of the negress Hall about six months before the killing: "When we met there she seemed to still be worried, so I pulled her down on my lap and talked with her a while, and she wanted some beer, so I goes and gets some beer and whisky, and Mrs. Jenkins and her mother hope to drink it, and then they went out on the porch, and Minnie gets up and shuts both kitchen doors, comes back and sat down side me, and we talked on a while, and finally she put one arm around my neck and kissed me three or four times, and said, 'Jack, I have a good mind to blow your brains out and kill myself.' I laughed and said, 'If I was you, I

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wouldn't spile my good mind.' I didn't think of her having any gun, so she begin to cry, and said, 'Now I mean that,' and I said, 'I know you do,' and she then taken a little gun from her bosom, and I grabbed her, and taken it, and we sat down and talked a while, and she taken hold of my hand and placed the barrel of that gun in her left ear and said to me, 'Now pull the trigger,' and I said, 'Quit your foolishness.' She said, 'I am not fooling.' So she put her finger on mine and tried to press on the trigger; but I managed to hold her hand and move the gun from her ear, but in so doing the gun went off, and thus it was that she got shot."

The prisoner then relates that he was not charged with the assault on the woman, and remained about Knoxville until Christmas, when he went to Etowah, where he remained until February 3d, when, in response to a letter from deceased, he returned to Knoxville and resumed his relations with her, seeing her every day for about a month. He relates that on the night of the killing when she was urging him forward to the commission of the act, he advised her to go home, but she said: "If I ever go in that home again, I'll be carried in. I mean to get out of my worry this night, if I have to walk down to the bridge and jump off in the river." She then requested him to wait until she could go down to her cousin's, Laura Campbell's, for a brief visit. I said, "What for?" she said, "Because I told Will" (her husband) "I was going there, and I want the last words I told him to be true." She remained at Laura Camp-

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bell's about ten minutes and then returned to the corner of Lithgow and Church streets, where the tragedy was enacted. The following is the prisoner's statement of it: "She came back . . . and put her arm around my neck, and said: 'Now, dear, I am ready to leave this troublesome world with you, and do it before some one comes by that knows me. I don't care after I am dead.' So I placed the gun to her head and fired, and she slapped her hand on her stomach and said, 'Right here,' and I put the gun there and fired, her arm still around my neck and mine around her waist; but when I fired that time she hollowed and said, 'Once more, and I'll be dead.' So I turned her aloose and put the gun to my own head, and it failed to go off, and I couldn't go on with her. But I am going to her just as willing as she was; for, as she is dead, I don't want to live."

The officer who made the arrest stated that the prisoner had in his possession a written statement of Minnie Scott, the deceased, giving a complete history of her relations with Peter Turner and their plans to die together. This statement was given to a detective, Simon F. Nichols, who it appears was in Chattanooga at the time of the trial and was not examined as a witness, nor was the statement of the deceased woman in evidence.

A survey of this testimony leaves no doubt in the minds of the court that this was a willful, deliberate, and premeditated killing, and that plaintiff in error is guilty of murder in the first degree. The fact that the woman consented and the crime was in execution of a joint

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agreement would not remove the case from this grade of felonious homicide, since the crime embraced all the elements of malice, deliberation, and premeditation necessary to constitute murder in the first degree.

Murder is no less murder because the homicide is committed at the desire of the victim. He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. 1 Hawk. Pleas of the Crown, ch. 27, section 6; 1 Russell on Crimes, 670, citing Sawyer's Case (1815) Old Bailey MS., all cited in 8 Am. & Eng. Encyc. of Law, p. 294, text, and note 5.

Mr. Wharton, in his work on Homicide (3d Ed.), section 54, states the rule thus: "The law does not require that a homicide shall be committed against the will of the person killed. If a man kills another with his consent, or by his desire, he is as guilty as if he had killed him against his will. . . . And the act of a woman in taking and swallowing poison in the presence and by the direction of a man renders his the act of administering it, constituting it murder in the first degree, where death results."

It may be said, however, there is an absence of express malice, a necessary ingredient of the crime of murder in the first degree, since it is not shown there was hatred, or ill will, or malevolence on the part of the prisoner toward the deceased.

Mr. Wharton, in his work on Homicide (3d Ed.), section 116, says: "The terms 'express malice,' or 'express

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malice aforethought,' used in statutory provisions as a necessary ingredient of murder in the first degree, not having been defined by statute, have been given the common-law definition: 'When one with a sedate and deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.' And a sedate and deliberate mind implies a mental condition sufficiently composed to admit of reflection on the design, and to comprehend the nature and probable consequences of the designed act; and to warrant a verdict of murder in the first degree under such provisions the killing must have been the consummation of a previously formed design to take the life of the deceased, and the design to kill must have been formed deliberately and with a sedate mind. An actual and deliberate intention to take the life of another, or to do him some great bodily harm from which death might probably result, constitutes express malice. The statutory term means express malice aforethought as it existed at common law, as distinguished from implied malice. It necessarily renders any murder of the first degree; and it may be inferred from the circumstances attending the act of killing, and is proved by circumstances evidencing a sedate, deliberate purpose and formed design to kill another."

The same author, at section 135, says: "And where a homicide was committed, and there was a deliberate

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and premeditated intent to do the act, and no circumstances of excuse, justification, or extenuation recognized by law, it is murder in the first degree."

It thus appears that it is not necessary that express malice, in the sense of hatred or malevolence toward the deceased, should be shown in order to support a verdict of murder in the first degree. This may be illustrated by the case of *Warren v. State*, 4 Cold., 130. In that case it appeared that Rainey Warren (a free person of color) was convicted of murder in the second degree for drowning a child under three years old, the son of her former owner. The evidence on the trial tended to show that the crime was actuated by a motive of revenge against the mother of the child. The circuit judge instructed the jury: "The defendant cannot be found guilty of murder in the first degree under the proof. The deceased was a child—a mere infant under three years old—and to make out a crime of murder in the first degree, there must be a premeditated, malicious, and deliberate killing, and the malice must exist in the mind of the person against the deceased. Now, malice in this case is absent. The prisoner, if she did the killing, had she malice against this little harmless child? If she had malice, was it not against the mother of the deceased or some other person? This, then, was not murder in the first degree."

This charge was erroneous. Said this court: "Malice, it is true, as stated by the court, is an essential element

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in the crime of murder, either at common law or by the statute; but it does not necessarily follow that it must always exist towards the person slain. It may be express or implied. Express malice is where one with a sedate and deliberate mind and formed design kills another, which formed design is evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm." Wharton's Criminal Law, p. 360.

In the leading case of *Dale v. State*, 10 Yerg., 551, Judge Green, in defining the constituent elements of murder in the first degree, said: "When the act of killing is not done in the commission or attempt to commit some felony, nor by poison or lying in wait, in order that it be murder in the first degree, the killing must be done willfully (that is, of purpose, with intent that the act by which the life of a party is taken should have that effect), deliberately (that is, with cool purpose), maliciously (that is, with malice aforethought), and with premeditation (that is, a design must be formed to kill before the act by which the death is produced is performed). In other words, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought."

In *Sivan v. State*, 4 Humph., 136, Reece, J., said: "The characteristic quality of murder in the first degree, and that which distinguishes it from murder in the second

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degree or any other homicide, is the existence of a settled purpose and fixed design on the part of the assailant that the act of assault should result in the death of the party assailed; that death being the end aimed at, the object sought for and wished."

"Proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought." *Bratton v. State*, 10 Humph., 108; citing *Commonwealth v. Jones*, 1 Leigh (Va.), 611.

In *Lewis v. State*, 3 Head, 148, it is said: "The distinctive characteristic of murder in the first degree is premeditation. This element is superadded by the statute to the common-law definition of murder. Premeditation involves a previously formed design or actual intention to kill. But such design or intention may be conceived and deliberately formed in an instant."

When these principles of law are applied to the facts of this case, every element to constitute murder in the first degree distinctly appears, and the verdict of the jury is fully justified.

Counsel representing prisoner at the bar argued that the prisoner was insane at the time he committed the act, and incapable of distinguishing between right and wrong. This argument is based largely upon what is supposed to be intrinsic evidence of mental unsoundness furnished by the letters written by the prisoner and read on the trial below.

The enormity of the act and the absence of any mo-

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tive for the perpetration of the crime is said to reinforce the intrinsic evidence of insanity furnished by the letters. There was no evidence adduced on the trial of the previous insanity of the prisoner, nor was the testimony of any medical expert taken on this subject. While the motive for the commission of the crime is unusual, yet the criminal records furnished precedents of crimes committed in pursuance of a compact between two infatuated persons to die together. So far from the letters furnishing evidence of the insanity of the prisoner, they disclose evidence of the prisoner's intelligence and that he was a man of some education. As already stated, there was no evidence of hereditary insanity or previous acts tending to show an unbalanced mind, and no jury would have been warranted in pronouncing the prisoner insane, on account of the atrocity of the act and the sentimental motive that inspired it. Moreover, this question was left to the determination of the jury under a correct charge on the subject by the trial judge, and this court finds no evidence in the record to warrant it in disturbing the findings of the jury. It is not disclosed in the record that the prisoner did not have the benefit of the testimony of absent witnesses, nor was any application made for a continuance of the case.

We find no error in the record, and the judgment is affirmed.

Brown v. Sams.

I. N. BROWN v. E. B. SAMS.*

(*Knoxville*. September Term, 1907.)

1. **PARTITION FENCES.** Erected and maintained at joint expense; each to maintain particular part by agreement; liability for failure prevents recovery of damages by the one so failing. Partition fences upon the line between adjoining landowners may be erected and kept in repair at their joint expense; and when the fence is constructed between their cultivated lands, they may agree that each shall keep a particular part thereof in repair, and where such agreement is made, it is their duty to comply with it, and the one failing to discharge this duty is liable for all damages that may result from such failure, and therefore, cannot recover from the other damages caused to his crops by the other's hogs which passed through that part of the fence which he failed to keep in repair according to the agreement.

Code cited and construed: Secs. 2998-3005 (S.); secs. 2258-2265 (M. & V.); secs. 1688-1692 (T. & S. and 1858).

Acts cited and construed: Acts 1875, ch. 64.

2. **SAME.** Duty to keep in repair a certain portion cannot be avoided by verbal notice without the assent of the other. The obligation and contract upon the part of the adjoining landowners that each shall keep in repair a certain portion of a partition fence cannot be avoided or annulled by a verbal notice given by one to the other without the assent of the other; nor can the fence be removed under such circumstances.

Acts cited and construed: Acts 1857, ch. 64; Acts 1897, ch. 95.

Cases cited and distinguished: *Clowers v. Sawyers*, 1 Head, 157; *Stallcup v. Bradley*, 3 Cold., 407.

*Liability of owner for trespass of cattle, where partition fence is defective, see note to *Bulpit v. Matthews* (Ill.), 22 L. R. A., 55.

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3. SAME. Statutes relating to, not repealed by a no fence law, when.

A statute (Acts 1903, ch. 151), applicable to a certain county, making it unlawful to allow live stock to run at large, and making the owner liable for all damages done by such stock while at large, does not expressly repeal the statutes (Shannon's Code, secs. 2998-3005, and Acts 1875, ch. 64) in relation to partition fences; nor does it repeal them by implication, since there is no inconsistency between the earlier statutes and the later statute. (*Post*, p. 681.)

Code cited and construed: Secs. 2998-3005 (S.); secs. 2258-2265 (M. & V.); secs. 1688-1692 (T. & S. and 1858).

Acts cited and construed: Acts 1875, ch. 64; Acts 1903, ch. 151.

Cases cited and approved: *Fisher v. Baldrige*, 91 Tenn., 418; *McC Campbell v. State*, 116 Tenn., 107.

4. SAME. Hogs in owner's field are not "running at large" in sense of a no fence statute, when.

Hogs in the owner's field, and escaping therefrom through that part of a defective partition fence into the field of the adjoining landowner whose duty it was to keep the same in repair, were not "running at large" within the meaning of a no fence statute (Acts 1903, ch. 151) making it unlawful to allow live stock to run at large. (*Post*, p. 682.)

Acts cited and construed: Acts 1903, ch. 151.

FROM HAMBLLEN.

Appeal in error from the Circuit Court of Hamblen County.—G. MC. HENDERSON, Judge.

Brown v. Sams.

JAMES A. CARRIGER, for plaintiff.

MCCANLESS & TATE and J. J. N. SYKES, for defendant.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

This is an action of trespass, brought to recover damages to plaintiff's crop committed by the defendant's hogs. There was judgment in the trial court for the defendant, and the plaintiff brings the case to this court.

The facts as found by the trial judge are as follows: The plaintiff and defendant owned adjoining farms, and constructed upon the dividing line a partition fence; each agreeing to keep in repair a certain portion of it. After some years, and about two years before this suit was brought, the plaintiff notified the defendant verbally that he would no longer keep up his part of the fence, and allowed the same to become defective and out of repair. No written notice was given of the plaintiff's intention to withdraw from the agreement or to remove his part of the fence, and the defendant did not assent to such withdrawal. The defendant's hogs passed from his field, through that part of the fence which it was plaintiff's duty to keep up, into the field of the latter, and injured the crop growing thereon, to recover damages for which this action was instituted.

Partition fences upon the line between adjoining landowners may be erected and kept in repair at the

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joint expense of the adjacent proprietors. This may be done by agreement between the parties, or, in the absence of agreement, one party may erect or repair the fence and recover the proper proportion of the expense from the other. Code, secs. 1688-1692; Shannon's Code, secs. 2998-3005; Acts 1875, p. 75, ch. 64. When the fence is constructed, the parties may agree that each keep a particular part of the same in repair, and where such agreement is made it is their duty to comply with it, and any one failing to discharge this duty is liable for all damages that may result from such failure. Acts 1875, p. 75, c. 64. These statutes are compulsory on adjoining landowners, where, as the provisions in relation to crops imply, the lands are cultivated. The fence in such cases is equally beneficial to both of them, and the statute requires that they contribute equally to the expense of constructing and maintaining it. Neither has the right to remove such a fence, or fail to keep his part of it, when there is agreement to that effect, in repair.

The cases of *Clowers v. Sawyers*, 1 Head, 157, and *Stallcup v. Bradley*, 3 Cold., 407, were decided before the statute of 1875 was enacted. Acts 1897, p. 243, c. 95, applies only to cases where the fence used as a partition fence, or a part of it, is entirely upon the lands of one of the adjoining proprietors, and such proprietor is the owner of the fence. In such a case under that act the owner of the fence may remove it by consent of the other proprietor, or after six months' notice in writing

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of his intention to do so. It has no application to a partition fence constructed upon the boundary line and kept in repair at the joint expense of the proprietors under the provision of the Code and the act of 1875. Such a fence is the joint property of both proprietors, and neither has the right to remove it or any part of it.

It was therefore the duty of the plaintiff to have kept his part of the partition fence between his lands and those of the defendant in repair, and, the damages to his crop having resulted from a failure to discharge this duty, he is without remedy.

The plaintiff, however, insists that the defendant is liable for trespass committed by the hogs under chapter 151, page 315, of the Acts of 1903, which it is admitted applies to Hamblen county, making it unlawful to allow live stock to run at large and the owner liable for all damages done by such stock while at large. We do not think so. This statute does not repeal those in relation to partition fences. There is no express repeal. It is not done by necessary implication because there is no inconsistency, and the two statutes can well stand together. *Fisher v. Baldrige*, 91 Tenn., 418, 19 S. W., 227; *McCampbell v. State*, 116 Tenn., 107, 93 S. W., 100. The latter act creates a greater necessity for partition fences than existed before it was passed. It requires the owner of live stock to keep it confined, and partition fences are necessary in many cases for this purpose. Cases may occur where one of the adjoining

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proprietors may not wish to confine stock upon his premises, but under our system of argriculture they are rare. Again, the defendant's hogs were not running at large, but in his field, and escaped upon the premises of the plaintiff by the failure of the latter to keep up his part of the joint fence. He cannot complain of an injury that was the direct result of his own wrong.

There is no error in the judgment of the circuit court, and it is affirmed, with cost.

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CONVERSE BRIDGE COMPANY v. CARRIE O. GRIZZLE.*

(Knoxville. September Term, 1907.)

1. **MASTER AND SERVANT.** Master's duty to furnish safe tools and implements and to take notice of defects, when.

It is the master's absolute duty to use active diligence to prevent improper or unsafe tools or implements being furnished to an employee by which he may be injured; and it is not necessary that the master should be advised of the particular defects causing the injury; but he is liable if the defects were of such character that it was his duty to take notice of them. (*Post*, p. 692.)

Cases cited and approved: Guthrie v. Railroad, 11 Lea, 372; Bruce v. Beal, 99 Tenn., 304; Morriss v. Bowers, 105 Tenn., 64.

2. **SAME.** Same. Master's continuing duty to inspect appliances used by his servants.

The master is not only bound to furnish safe appliances in the first instance, but must exercise proper diligence to keep them safe, and cannot disregard the duty of inspection simply because the appliance has always performed its functions properly. (*Post*, pp. 692-697.)

Cases cited and approved: Bruce v. Beal, 99 Tenn., 304; Morriss v. Bowers, 105 Tenn., 64; Welsh v. Cornell, 49 App. Div., 203, 68 N. Y. Supp., 44; Houston v. Bush, 66 Vt., 331; Scandel v. Construction Co., 50 App. Div., 512, 64 N. Y. Supp., 222; Dyer v. Bridge Co., 193 Pa., 182.

*As to duty of master to inspect tools or implements furnished servants, see note to Gulf, C. & S. F. R. Co. v. Larkin (Tex.), 1 L. R. A. (N. S.), 944.

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3. **SAME.** Master's liability for injury from defective appliance on ground of negligence; case in judgment.

Where a servant is ordered by the master from his regular employment to assist in moving some heavy metal by a derrick, constructed of pine timbers, in use for about five years, and standing in the same position for nearly two years, without any inspection shown or appearing, and because of the rotten condition of its timbers, it collapsed while in use, causing the servant's death, the master will be liable in damages on the ground of his failure to exercise proper diligence to keep the derrick in safe condition.

4. **SAME.** Same. No error for refusal to give peremptory instructions directing a verdict in such case.

In such case as that shown in the foregoing headnote, there is no error in the refusal of the trial judge to direct a verdict upon the request of defendant for peremptory instructions. (Post, pp. 686, 687, 694, 697.)

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County.—M. M. ALLISON, Judge.

SMITH & CARSWELL, for Bridge Co.

HEAD & FORD, for Grizzle.

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MR. JUSTICE MCALISTER delivered the opinion of the Court.

The plaintiff below recovered a verdict and judgment against the bridge company for the sum of \$5.000 as damages for the negligent killing of her husband, George W. Grizzle. The company appealed and has assigned errors.

The cause of action alleged in the declaration was that the defendant company was engaged in the business of making steel bridges, and in the conduct of its business employed a derrick, constructed for the main part of wood, located just outside of a shed, and used in hoisting, handling, and moving heavy material. It is then alleged that the husband of plaintiff, G. W. Grizzle, was employed by the defendant company to work under the shed, and not on the outside; but that in June, 1906, deceased was ordered to leave his work to assist in loading and operating the derrick, and that while so employed the derrick gave way and fell upon deceased, killing him. It is alleged that the place where deceased was sent to work was unsafe and unsuitable by reason of the imperfect location of the derrick, its want of strength for the heavy load attempted to be lifted, its old and worn condition, and the fact that the braces and timbers and other material of the derrick were old, rotten, and not of sufficient strength and size, and not securely and safely attached and fastened at the base of the derrick, so as to hold and sup-

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port the structure. It is alleged that the lower part of the derrick was attempted to be fastened in the soil by means of braces extending into and under a box, with rocks over and around the brace or braces, so that the same could not be seen at the lower end, and at the time of the accident these braces gave way and pulled loose from the lower fastening, on account of being old, rotten, and insecurely fastened.

It is then alleged that plaintiff's husband was taken from a much safer work, which he understood, and was ordered to work at the derrick, a dangerous place, without being warned of its rotten and dangerous condition, or given any instructions how to do the work or avoid the danger. It is further alleged that the dangerous condition of the derrick was known to the defendant company, or could have been known by the exercise of ordinary care and caution, but was unknown to plaintiff's husband.

The defendant company interposed a plea of not guilty. Defendant introduced no testimony, but at the conclusion of plaintiff's testimony moved for peremptory instructions. This motion was overruled by the trial judge, and the cause submitted to the jury on plaintiff's testimony, with the result already stated.

The main contention on behalf of the defendant company in this court is that the trial judge erred in refusing to direct a verdict in behalf of the defendant, since there was no evidence on which a verdict could be based

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in favor of the plaintiff. This assignment of error calls for a review of the testimony.

It is admitted that the deceased was regularly employed in riveting tubes inside the shed, but a short time before the accident was ordered by the foreman to assist in moving some heavy pieces of metal, called "angles," for the purpose of placing them in a car. On account of their weight these angles were lifted by a heavy derrick. The construction of the derrick is thus described: It had a straight mast, which stood upon a frame and was supported by two beams, known as "stiff legs." The whole structure stood upon a frame or platform of heavy beams about four or five feet above the ground. Around the end of the stiff legs, which were bolted to this framework, were placed pens made of cross-ties and filled with large rock, coming up some three feet on the stiff legs. The object of this arrangement was to make a counterweight for the weight that was to be lifted by the derrick. The mast moved laterally on a pivot at the top and bottom, which moved in properly arranged iron plates, the top plate being attached to the upper ends of the two stiff legs; the stiff legs acting thus as braces and standing at an angle of some thirty or forty degrees, and being, of course, to an extent supported by the top of the mast. The pens in which the stiff legs rested were about twenty feet from the base of the mast. The stiff leg was the main brace to hold the upright piece or mast, so that it would carry the load. The stiff leg or brace in this derrick was

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constructed of pine boards or planks, consisting of three pieces 2x6 and bolted together. It was about twenty feet from the point where the brace was fastened to the mast at the top of the derrick to the point where it went into the pen.

A witness who examined the stiff leg immediately after the accident stated it appeared that some pieces had been nailed onto the bottom where it broke. Another witness arrived on the scene a few minutes after the accident and examined the stiff leg. He stated that it was a rotten structure, and was lying on the ground apart in many places; that it was rotten, and not safe for any kind of business.

This derrick had been in use probably five years and had stood in the same position from one and one-half to two years. At the time of the accident the deceased was engaged in attaching the chain of the derrick to a pile of angles, and while the workmen were attempting to lift the load—only a portion of the weight having been taken by the derrick—it suddenly collapsed; the mast striking the plaintiff's husband, from the effects of which he died.

An examination of the derrick after the accident disclosed that one of the stiff legs had been fractured in the fall, about one foot beneath the surface of the rocks which were placed in the pen, and a further examination revealed that this stiff leg had partially rotted. There was also some evidence tending to show that the cause of the collapse of the derrick was the

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breaking away of the mast from the plate at the top. However, one witness, who was turning the crank to lift the load at the time of the accident, testified that he saw the stiff leg give way first. The other witness, who claims that the derrick fell in consequence of the breaking loose of the mast at the top, shows that he was twenty-five or thirty feet away at the time of the accident and not looking in the direction of the derrick. It seems that his testimony was rather a matter of opinion from what he saw after going to the scene of the accident. There can be no question, we think, on this record, that the cause of the falling of the derrick was the breaking of the stiff leg on account of its rotten condition. One witness testifies that the stiff leg that broke was made of pine, about one-half heart and one-half sap, and that the part of the leg which was in the pen was rotten. Another witness stated that the derrick was generally rotten.

It is claimed on behalf of the bridge company that the defect in the stiff leg was latent, and not discernible to ordinary observation by reasonable inspection. It is said that the fracture of the stiff leg occurred about a foot below the point where it was covered with the stone, and that this defect could not have been observed without moving the cross-ties and the stone, and subjecting the stiff leg to a process of cutting or hammering. It is further said on behalf of the company that the proof of plaintiff wholly fails to show a want of

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proper inspection of the derrick by the defendant company.

On the subject of inspection of the derrick, we find evidence tending to show that the company had breached its duty in this regard. Frank Brown testified that he had been in the employ of the company for the last five years, that he saw the derrick often, and during this time no repairs had been made, unless it was to fix the pins at the top; and there had been no repairs on the stiff leg and mast during that time. Witness states that the stiff legs in these pens were rotten, and an inspection would have discovered it. The test to be applied was either striking the braces, or inserting some sharp instrument into them, or the rotten condition could have been seen by moving the rocks.

Wilson Kerr was introduced as an expert on derricks. Witness stated that he had had thirty-five years' experience in handling derricks, and there is no difficulty in ascertaining by inspection whether the timbers are sound or not. He was asked what method he had for telling whether they are sound or not. Witness answered: "Why, I examine them by chipping into them, and I can tell in that way. When you drive a nail into them, you can tell whether they are sound or not. There is no trouble in detecting their unsoundness." Witness further stated that it was customary to test wooden derricks before using them to ascertain whether they were intact and able to carry the load, and he did not

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consider it safe to use a wooden derrick of that kind for the purpose of lifting a heavy load without making this test. Witness was further asked: "What examination do you make of a derrick? A. Well, I look for the particular wood out of which the stiff legs are made, in the first place, to see whether they are sound or not, and before I take my loads I put a test to see if everything is all right. You take a stiff leg that may be apparently dry and all right; but when it is down in the rock you don't know about it, so it is best to test it."

The record discloses that plaintiff's husband was taken from his regular employment and directed to assist in moving these heavy angles without any instructions whatever. The derrick had not been inspected by the company, and by reason of the character of the material of which it was constructed, its long usage, and exposure to atmospheric agencies, it had become rotten and unsound. An examination of this record will disclose that, if the proper tests had been applied and periodical inspection of the derrick made, its unsoundness would have been discovered. The defendant's foreman, who had charge of the derrick, was not examined as a witness; nor was any proof offered on the part of defendant to rebut the *prima facie* case made by the plaintiff. The facts touching inspection and knowledge of the unsoundness of the timbers composing this derrick were peculiarly within the breast of the foreman of the

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company and other employees, who were not examined by the defendant.

The general principles of law applicable to this case are well settled. The general rule is that it is not necessary that the employer should be advised of the particular defects causing the injury. It is enough if the defects were of such character that it was the duty of the employer to take notice of them. The duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee by which he may be injured. *Morris Bros. v. Bowers*, 105 Tenn., 64, 58 S. W., 328; *Guthrie v. Railroad*, 11 Lea, 372, 47 Am. Rep., 286.

In *Bruce v. Beal*, 99 Tenn., 304, 41 S. W., 449, it was said: "An employer cannot continue to use machinery not obviously dangerous without imputation of negligence, merely because it has been in daily use for years and has uniformly been found adequate, safe, and convenient, as the fact that a machine has never given way raises no presumption that it never will."

The court further remarked: "The master is not only bound in the first instance to use reasonable care in the selection of machinery and appliances, but also to exercise reasonable and proper watchfulness to see that they are kept in proper condition, because, however perfect they may be when bought, they are liable from ordinary use and wear to get out of repair, and such care and watchfulness is due to guard against defects that

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may arise from use as the nature of the business and the risks incident thereto may demand."

Again, in *Morriss v. Bowers*, supra, it was said: "And it is likewise the master's duty to furnish his employees places to work in which they will not be unnecessarily exposed to danger. The master is held responsible for all defects that are discoverable by the application of the usual and ordinary tests, but not for latent defects not thus discoverable."

In view of these well-established principles the defendant company was not authorized to disregard its duty of inspection simply for the reason that the derrick had been properly performing its functions and that apparently it was endowed with its accustomed strength. The exposure of these timbers to atmospheric agencies during a period of five years was sufficient in itself to admonish the company of its deterioration, especially in view of the enormous weights to which the structure was subjected and its habitual use. It would, indeed, have been remarkable if the joints and timbers and braces of this structure, so exposed and so habitually subjected to severe tests of its strength, would not weaken and deteriorate. The company had no right as a matter of law to assume under these circumstances that this structure was intact, but it was charged with an absolute duty of periodical inspection to ascertain its strength. According to the testimony of the expert, Kerr, there is no trouble in definitely ascertaining by tests whether such a mechanical device is sound and

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capable of performing the tests to which it will be subjected.

It is said on behalf of the company that the record is silent on the subject of inspection, and it does not affirmatively appear that the company failed in its duty in this respect. Two witnesses testified on this subject. Bryson, who had been in the employment of the defendant company for two years, testified that during the time of his employment he had no knowledge of any inspection being given this derrick. The witness Brown testified that he had been in the employment of this company for several years, and there had been no repair of said stiff leg and mast during that time.

We think the jury was warranted in inferring from this testimony that no inspection had been made by the company, especially when it is remembered that the foreman of the company, who had especial knowledge on this subject, was not introduced as a witness. The jury were warranted, also, in finding from the proof that the stiff leg in question was rotten, and was the primary cause of the fall of the derrick, and that this defect could have been discovered by the exercise of ordinary inspection on the part of the company.

On the subject of inspection, Mr. Labatt, in his work on Master and Servant (volume 1, sec. 154), says: "Such being the character of the master's responsibility, the existence of the duty of inspection is a necessary consequence of the fact that the master's obligations cannot be adequately discharged unless, during the

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entire period of which that responsibility is predicated, he takes notice of whatever a reasonably prudent person would have ascertained under the particular circumstances which happen to be involved."

The same author, at section 157, says: "That a master cannot in a majority of instances be pronounced free from negligence, as a matter of law, where the instrumentality which caused the injury had never been inspected at all before the accident, or not at the time when it should have been, is obviously a necessary consequence of assuming that inspection is one of the duties which he owes to his servants. Usually, therefore, the case is for the jury wherever the evidence tends to show such omission to inspect. . . . It has been held that the rule that the performance of a duty may sometimes be presumed is not available in the master's favor, where the question is whether an instrumentality has been duly inspected."

The same author in a note says: "Verdicts for the plaintiff have been sustained where the clamp to which a derrick guy rope was fastened was only inspected once a week. *Welsh v. Cornell* (1900), 49 App. Div., 203, 63 N. Y. Supp., 44. In that case the court suggested that there should have been a daily inspection. Where a derrick gave way, owing to the working out of a pin which was, almost every day, subjected to the strain of lifting heavy loads, and had not been inspected for about thirty days before the accident, a verdict for plaintiff was sustained. *Houston v. Brush* (1894), 66

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Vt., 331, 29 Atl., 380. Where the attachment which held the boom in its place had not been examined for over two years. *Scandell v. Columbia Const. Co.* (1900), 50 App. Div., 512, 64 N. Y. Supp., 232. Or, as another case has it, for several years. *Dyer v. Pittsburg Bridge Co.* (1901), 198 Pa., 182, 47 Atl., 979.

The author, at section 159, treats of specific circumstances that should put an employer upon inquiry as to the condition of instrumentalities.

“(c) *Length of Time Instrumentality Has Been in Use.*—In view of the natural tendency of an inorganic instrumentality to become less and less safe the longer it is used, a court will not set aside a verdict for the servant which is based upon the theory that the failure to inspect it was culpable, where the evidence shows that it had been a part of the master's plant for such a period that, taking into account the nature of the materials of which it was composed, the functions it was performing, and the various influences to which it was exposed by climatic changes or physical forces, it is not an unreasonable inference that a prudent man would have examined it for the purpose of ascertaining what its actual condition was.

“(d) *Operation of Physical Forces.*—The principle that the master is bound to foresee the ordinary results of the action of physical laws upon the materials of which his instrumentalities are composed, or the materials which those instrumentalities are designed to deal with, entails the consequence that he is bound to

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examine the instrumentalities when there is any reason for apprehending that they may have become abnormally dangerous from this cause."

When these principles are applied to the facts of this particular case, there can be no escape from the conclusion that the bridge company was guilty of a breach of duty in the matter of inspection, and that as a proximate consequence of that negligence, and without fault on the part of the deceased, this accident, so disastrous in its consequences, resulted. No assignment of error is made on the amount of the verdict, and, when the facts disclosed in the record touching the age and character of the deceased are considered, the assessment of damages by the jury could not be claimed to be excessive.

The result is the judgment of the court below must be affirmed.

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J. B. FINLEY v. ACME KITCHEN FURNITURE COMPANY
AND
JOHN FINLEY, by next friend, v. ACME KITCHEN FURNITURE COMPANY.*

(*Knowville*. September Term, 1907.)

1. **APPEAL.** Reprimand of attorney by trial judge is not reviewable.

The reprimand of an attorney by a trial judge, even if it be unwarranted, cannot be undone or reviewed by the supreme court. (*Post*, p. 702.)

2. **SAME.** From judgment for costs of investigating professional conduct of an attorney.

Right of appeal from a judgment taxing an attorney with the costs of an investigation of his professional conduct in a pending case exists. (*Post*, pp. 702, 703.)

3. **ATTORNEYS.** Taxed with cost of investigation of misconduct towards associate

Part of the costs of an investigation of the professional conduct of the attorneys in a pending case is properly awarded against the one who unjustly prejudiced their common client against an associate attorney by stating wrongly that the declarations

*As to question whether one employing child under statutory age may rely on contributory negligence, or assumption of risk, to defeat liability for personal injury sustained by the latter, see note to *Lenahan v. Pittston Coal Min. Co.* (Pa.), 12 L. R. A. (N. S.), 461.

Employment of child in violation of statute as negligence which will sustain an action by the child for personal injuries, see note to *Rolin v. R. J. Reynolds Tobacco Co.* (N. C.), 7 L. R. A. (N. S.), 335.*

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filed by him were fatally defective, whereas they were sufficient and valid with the intent to procure the associate attorney's discharge from the cases, though the latter had treated the other unfairly by omitting his name from the declarations and filing same without consultation with him and otherwise.

4. EMPLOYER AND EMPLOYEE. Sufficient declaration for injury to infant under fourteen employed in a factory.

A declaration upon the facts of the case, without more, showing that an infant under the age of fourteen years was injured while working under employment, in a furniture factory, is sufficient to sustain the action against the employer for the injury. (*Post*, p. 705.)

Case cited and approved: *Iron & Wire Co. v. Green*, 108 Tenn., 161.

5. PLEADING AND PRACTICE. Correction of mistake in referring to a statute by the wrong chapter is no cause for continuance.

A mistake in a declaration in an action for personal injuries to a child under fourteen years of age, while employed in a factory, by referring to the statute prohibiting such employment by the wrong chapter number, is so unimportant and immaterial that the mere suggestion to the court would have been sufficient for leave to make the correction, and, even if made in the midst of a trial, no judge would have granted a continuance of the case on that account. (*Post*, pp. 705, 706.)

6. ATTORNEYS. Evidence showing misconduct towards associate warranting taxation of half of the costs of investigation against him.

The evidence in an investigation of the professional conduct of an attorney in a pending suit is stated, examined, and held sufficient to show misconduct in prejudicing the mind of their common client against another attorney jointly employed with him, warranting the taxation of half of the costs of such investigation against him.

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FROM HAMILTON.

Appeal in error by J. T. Cameron, an attorney connected with the cases, from a judgment for certain costs, rendered by the Circuit Court of Hamilton County.—M. M. ALLISON, Judge.

BURKETT, MILLER & SWAFFORD and HEAD & FORD, for plaintiffs.

WILLIAMS & LANCASTER, for defendant.

ROBERT T. CAMERON appeared and argued for himself.

MR. CHIEF JUSTICE BEARD delivered the opinion of the Court.

These causes are before us on an appeal involving an issue collateral in its nature. They were brought by a father in his own interest for the loss of services of an infant son, the result of a serious injury received by the latter from the alleged negligence of the furniture company, and by the son, through a next friend, to recover damages in his own right for the same in-

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jury. The actions were brought for the several plaintiffs by J. O. Benson, a young lawyer of the Chattanooga bar. Subsequently, by an arrangement between J. B. Finley and Benson, made in view of an original agreement, R. T. Cameron, a member of the same bar, was associated with Benson as an attorney of record in these causes. Before this was done there arose friction between the client, J. B. Finley, and Benson, and between the latter and Cameron. This friction resulted in bad blood between these parties. After declarations had been prepared and filed by Benson in the several causes, this friction evidently became more and more aggravated, and in the end W. B. Miller, a member of the same bar, was called into the cases by J. B. Finley. A determination was then reached, it is apparent from the record, to get rid of Benson by a dismissal of these causes and by the institution of new suits for the same causes of action against the furniture company. In pursuance of this plan, orders of dismissal were prepared by Mr. Miller and filed with the clerk of the circuit court of Hamilton county, of which notice was given by him to Benson, who, when the matter was presented to the circuit judge in open court, opposed the entry of these orders. At that time it was disclosed to the circuit judge that there had been possibly a gross violation of professional propriety both in the institution of the original suits and also in the methods adopted to get rid of them, as well as the services of Benson, the attorney who brought them. Upon this

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discovery a rule was made upon the attorneys apparently implicated, which being answered, in due time the trial judge appointed a committee, composed of leading members of the local bar, and directed them to make a thorough investigation of all matters pertaining thereto, and, if satisfied that there had been wrong done on the part of any one or all of these attorneys, to report back to him, with the evidence taken and with charges preferred. At the end of an investigation, which the record shows was both extensive and thorough, this committee reported, and at the same time preferred charges against all these attorneys whose names have been given. The circuit judge, however, dismissed the proceeding so far as Miller was concerned, but upon the evidence and report reprimanded in open court both Cameron and Benson, and charged each with half of the cost of the proceeding. Benson submitted to the judgment of the court; but Cameron has appealed, and insists in this court that there was nothing in the evidence either to warrant his disbarment as a lawyer or his reprimand by the trial judge. So far as the reprimand is concerned, that is passed, and, even if it were unwarranted, it could not be undone or reviewed by this court. But the right of appeal from the judgment, in so far as it taxed him with a part of the costs of the proceeding, does exist; and, if the plaintiff in error is right in his insistence, then the action of the trial judge as to this may be set aside, and thus indirectly

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he could be relieved. Does this record warrant the insistence made in Cameron's behalf?

The testimony shows that the son of John B. Finley, a child under fourteen years of age, while in the service of this furniture company, was so seriously injured that an amputation of one of his legs was necessary. Either through the newspapers of the city of Chattanooga, or else through a friend who knew of this accident and also had some acquaintance with Finley, Benson's attention was called to this accident and to the fact that a lawsuit would probably grow out of it. Through one or more friends Benson solicited employment in the suit, if one should be determined upon, and immediately thereafter visited the home of Finley and personally sought such employment. After one or two visits the bringing of these two suits in question was agreed upon, and according to Finley it was at the same time stipulated that Cameron was to be associated with Benson in the bringing and the conduct of the cases. The two summonses, however, were sued out by Benson as the sole attorney, and as such, after proper service, declarations were filed by him, omitting therefrom the name of Cameron. At the time of the accident, as well as at the institution of the suits, Cameron was absent from Chattanooga. On his return he ascertained from Finley that his services were required, and that it had been stipulated in the beginning that Benson and he should be jointly associated in the litigation. Soon afterwards a meeting occurred between the father (J.

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B. Finley), Benson, and Cameron, where a somewhat angry colloquy occurred, but which resulted in the making of a written agreement by the terms of which Cameron and Benson were jointly to conduct these causes. The charges against Mr. Cameron are found in the following paragraphs of the judgment of the court, predicated upon the report of the committee of investigation and the testimony submitted to the court by this committee. They are in the following words:

“First. That attorney R. T. Cameron, after his employment in the two cases against the Acme Kitchen Furniture Company had been fully conceded in writing by Attorney John O. Benson, proceeded in violation of all professional ethics to endeavor to prejudice their common client, J. B. Finley, against the said J. O. Benson, by telling the said Finley that the declaration drawn by said Benson was defective, and that this was done with the evident intention on the part of said Cameron to so prejudice the said Finley against the said J. O. Benson as to result in the discharge of Benson from the cases.

“Second. That Attorney R. T. Cameron, actuated by motives of personal resentment against John O. Benson, whom he charged of having stolen business from him, connived at an arrangement whereby the suits commenced by John O. Benson were to be dismissed and new suits instituted for the same causes of action, in which their common client was to be represented by himself and Attorney W. B. Miller, but in which suits

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the said John O. Benson was not to be employed as an attorney."

We agree with the circuit judge in his judgment of condemnation of the conduct embraced in these charges, if it be true that the evidence submitted establishes their truth. The evident impression upon Finley's mind was that these declarations already filed were radically wrong, and that an effort to amend them would result most likely in a continuance of the cases and a postponement in ultimate recoveries which were sought in them. These declarations are sent up as a part of the record, and have been examined by the court, and the impression thus conveyed is not at all warranted. Each declaration contains two counts. In each of the counts recovery is sought, not only on the ground of negligence on the part of the defendant in the operation of the elevator on which the injury occurred, but especially by reason of the fact that the injured party was an infant under fourteen years of age. The first count in both declarations would have supported the action, without more, had it proved to be a fact that he was in the service of this corporation, hurt in that service, and under fourteen years of age. This count declared on the facts of the case, and, without more, was sufficient to sustain the action. *Iron & Wire Co. v. Green*, 108 Tenn., 161, 65 S. W., 399. The second count in each declaration declared upon the statute which makes it a misdemeanor to employ children in a manufactory, such as that of the defendant, when four-

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teen years of age, but by inadvertence referred to the statute in question as chapter 159 of the Acts of the general assembly of Tennessee of 1901, while in fact it was chapter 34 of these Acts. As has been said, a recovery could have been rested upon the first count of each of these declarations. No amendment was required of that count. As to the second count, the slip of the pen, just referred to, was so unimportant and immaterial that the mere suggestion to the court would have been sufficient for leave to make the correction, and, even if made in the midst of a trial, no judge would have on that account granted a continuance of the case. We are at a loss to account for the criticism made on these declarations, unless it was made for the purpose of increasing the animosity upon the part of the common client to Benson, with a view of getting rid of him by the dismissal of the cases which he had brought. The record shows that Mr. Cameron originally suggested the defect in the declaration, and that the suggestion had the effect of both alarming and exasperating Finley is certainly true. Finley testifies that this suggestion came from Cameron. It was stated by Finley to a number of parties that the idea of the defect in the declaration was communicated to him by Cameron. While in the letter denying that he either alone, or in association with another, instigated the dismissal of these suits in order to get rid of Benson and leave himself and Miller jointly to conduct the new suits, yet we think it apparent, from the admissions made by Cam-

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eron in his testimony, that in spirit and in substance this was done by him. Speaking of the conversation in which he told Finley that the declaration would have to be amended, he said:

"It came up in this way: He was discussing his dissatisfaction with Benson about the way he had done, what he had told him about the insurance money, and what Benson had told him in reference to having evidence as to how the accident occurred, and, further, about the way he had acted in the beginning of the suit in not putting me in the suit at the start like the agreement was; and then in discussing these things he said that he wanted to get rid of Benson. And while we were discussing this I said: 'Yes; the declaration will have to be amended.' I told him that he had filed the declaration without submitting it to me, and that I had since learned that the declaration was wrong; that the wrong chapter was used. Finley asked me what he could do with the lawsuit—how he could get rid of Benson. I told him I was not a man to advise him, because I was in the lawsuit with Benson; that it was his lawsuit, and that he could do as he pleased with it; and that he would have to get his advice from another source. I did not recommend to him the employment of Miller, did not recommend the employment of anybody, nor did I tell him not to dismiss the suits, because I was satisfied for him to dismiss the suits. I did not feel like I owed Benson anything, the way he had acted in the suit. I did not feel like I owed him

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any courtesy to use my influence with Finley to retain him in the suit, and I told Finley that he could do as he pleased and get his advice from some one else, and I recommended no one. Nor did I try to keep him from dismissing Benson. . . .”

Again he says: “I did not particularly care whether Benson was turned out or not. Finley had a right, the way I looked at it, to dismiss him if he wanted to. He had a right to dismiss Benson, if Benson gave him cause. He had a right to control his own business, and I did not feel friendly enough disposed to Benson, knowing the facts as I did know them from the inception down to that time, to use my influence with Finley to try to keep Benson in the suit.”

In a number of places in his testimony this is repeated in one form or another—that he told Finley that “if he wanted to dismiss Benson he could do so, and that if he wanted to dismiss” him (Cameron) he could; but he admits that he had no idea that the dismissal of Benson would affect his employment in the case.

The motion to dismiss these suits was made by Mr. Miller after his employment. While the motions were pending Mr. Pope Shepherd was present at a conversation which occurred between Mr. Anderson, of the Chattanooga bar, and Mr. Cameron, when, according to him, this occurred: “Anderson asked Cameron if Miller was going to get him and Benson out of that lawsuit, and Cameron replied to let Miller go ahead with his motion, that it was all right with him [Cameron], that he had

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an understanding with Miller, and would be in on the Miller suit. He further said that Benson had done him a dirty trick in getting the lawsuit."

On the whole record we are satisfied that the circuit judge was right in his finding, that after being associated with Mr. Benson, exasperated with him on account of what occurred at the inception of these cases, and finding their common client in bad humor with Benson, he increased the ugly temper of his client toward Benson, and alarmed with the suggestion that there was a defect in his declaration. We are unable to resist the impression that the purpose of this suggestion was to accomplish the very result that came about; that is, the dismissal of the suits brought by Benson and Benson himself. The suggestion of a defect to an ignorant man, as Finley was, anticipating, as he evidently did, substantial fruits from this litigation for himself and his son, and anxious to gather in these fruits at an early day as possible, could not have otherwise than the effect of greatly alarming Finley and increasing his dissatisfaction with Benson. Conceding it to be as claimed by Cameron, that he had been badly treated by his associate, yet, after having accepted a joint employment with him, it was a violation of professional propriety so unwarrantably to stimulate their common client against this associate to and for his discharge.

We think that there is abundant evidence to support the judgment of the circuit judge in taxing Cameron with one-half the costs; and his judgment is affirmed.

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J. N. MOORE v. CHATTANOOGA ELECTRIC RAILWAY COMPANY *et al.*

(Knoxville. September Term, 1907.)

1. **MASTER AND SERVANT.** Street railway is not liable for injuries to its employee received from a telephone pole used by it, when.

A street railway company is not liable to its conductor for injuries received by his head coming in contact with a pole while he was leaning from the platform of the car to watch the trolley, where the pole was not upon its right of way, and was not erected by it, but by a telephone company, which deprived the street railway company of all control over it or power to remove it, although the street railway company used the pole jointly with the telephone company. (*Post*, pp. 714-717.)

Case cited and approved: Railroad v. Moore, 113 Tenn., 531.

2. **SAME.** Employee's contributory negligence deprives him of right to recover, when he knew of the danger.

Where a telephone pole against which a street railway conductor's head was struck while leaning from the platform of the car to watch the trolley was such an obstruction and in such position that it would necessarily come under his observation, and that he must have known, or by the exercise of ordinary care could have known, of its existence and location, his own negligence was the proximate cause of his injury, which deprives him of the right to recover for the damages. (*Post*, pp. 716, 717, 718.)

Case cited and approved: Ferguson v. Cotton Mills, 106 Tenn., 239.

3. **SAME.** Assumption of risk by employee bars recovery for injuries, when.

A street car conductor continuing in the service of a street railway company, with knowledge or inexcusable ignorance of an

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obstruction and the necessary danger attending it, assumes the risk of such danger, and is barred of any recovery for an injury received from such obstruction. (*Post*, pp. 718, 719.)

Cases cited and approved: *Jennings v. Railroad*, 7 Wash., 275; *Drake v. Railroad*, 178 N. Y., 466; *Ladd v. Railroad*, 180 Mass., 454.

4. **TORTS.** Joint or separate actions against all tort feors, with recovery for full damages.

The plaintiff in an action of tort may sue all the tort feors jointly, or he may maintain separate actions against each of them; and, whether the action be joint or separate, he is entitled to recover full damages against all the parties guilty of the tort. (*Post*, p. 721.)

Cases cited and approved: *Railroad v. Jones*, 100 Tenn., 515; *Swain v. Copper Co.*, 111 Tenn., 433.

5. **SAME.** Same. Judgment in tort in favor of defendant is conclusive of another action against him though other parties may be sued jointly with him.

While the plaintiff in an action of tort may sue separately or jointly, but if he sues separately, he cannot, after judgment upon the merits, maintain a new action against the one sued separately by merely joining others therein, as a judgment upon the merits in favor of a telephone company in an action against it for injury to a street railway conductor whose head was struck against a telephone pole, while leaning from the platform of the car to watch the trolley, is conclusive of and a bar to a subsequent joint action against it and the street railway company so far as the telephone company is concerned. (*Post*, pp. 719-723.)

Case cited and approved: *Sessions v. Johnson*, 95 U. S., 347.

6. **RES ADJUDICATA.** Record as evidence as to identity of parties; further evidence is required, when.

The burden of establishing the plea of former adjudication rests

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upon the party relying thereon; but where such party has produced and placed in evidence the record relied upon in the plea, he has made out a *prima facie* case, if it shall appear from an inspection of that record with reasonable certainty that the parties to that case and the cause of action then sued upon are the same as those in the pending suit. It is only where these facts do not appear that further evidence is required to sustain the plea. (*Post*, pp. 723, 724.)

Cases cited and approved: *Ridley v. Buchanan*, 2 Swan, 559; *Williams v. Hollingsworth*, 5 Lea, 360; *Packet Co. v. Sickles*, 5 Wall., 592.

7. **SAME.** Same. Case in judgment.

A record introduced in evidence, in an action by a street railway conductor against the street railway company and a telephone company for personal injuries, for the purpose of establishing the plea of former adjudication interposed by the telephone company, is sufficient to make out a *prima facie* case of identity of parties and cause of action, where such record discloses that in that case a person of the same name as plaintiff in the pending suit was plaintiff in the former suit, and that a telephone company of the same name as defendant telephone company in the pending suit was defendant in the former suit, and contains averments substantially the same as those in the declaration filed in the pending suit, though the declaration in the pending suit contains averments of negligence not found in the former suit. (*Post*, pp. 719-724.)

8. **JURISDICTION.** Of United States circuit court of appeals to enter final judgment where jurisdiction is dependent on diversity of citizenship.

The United States circuit court of appeals has jurisdiction to enter a final judgment where jurisdiction is dependent on diversity of citizenship, and the judge of the lower court, upon remandment, cannot open the case, and has no judicial function to exercise in the matter, and can only execute the judgment

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of said circuit court of appeals, which is merely a ministerial act. (*Post*, pp. 724-726.)

Acts of congress cited and construed: Acts 1891, ch. 517, secs. 6 and 10.

Cases cited and approved: *Iron Co. v. Meeker*, 109 U. S., 181; *Mower v. Fletcher*, 114 U. S., 128; *Railroad v. Tourville*, 179 U. S., 326.

9. **RES ADJUDICATA.** Opinion in former case examined to see the point of decision and whether on the merits.

Where a plea of former adjudication is interposed, the written opinion of the court in the former case may be examined to ascertain the point on which it was decided, and to determine whether the decision was upon the merits. (*Post*, pp. 726, 727.)

Cases cited and approved: *Fowlkes v. State*, 14 Lea, 14; *State v. Bank*, 96 Tenn., 595.

10. **SAME.** Judgment dismissing suit upon demurrer is upon the merits, when.

Where it appears that the former suit was dismissed, not for any defect in the pleadings, or other question not going to the right of the plaintiff to maintain his action, but because, upon his own statement of the facts, he had no cause of action against the defendant, the judgment, although upon demurrer, was upon the merits, and is sufficient to support a plea of former adjudication. (*Post*, pp. 726-728.)

Cases cited and approved: *Peeler v. Norris*, 4 Yerg., 331; *Welsh v. Harmon*, 8 Yerg., 103; *Murdock v. Gaskill*, 8 Bax., 22; *Holsden v. Caldwell*, 1 Lea, 50; *Thompson v. Blanchard*, 2 Lea, 528; *Grottenkemper v. Carver*, 4 Lea, 375; *Parkes v. Clift*, 9 Lea, 524.

11. **SAME.** Transcript of record from court rendering final judgment, though remanded for execution thereof, is from the proper court, when.

A transcript of the record from the United States circuit court

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of appeals filed as evidence to establish a plea of former adjudication is a full and complete record of the case, and comes from the proper court, where the cause was finally heard and determined upon the merits in that court, and final judgment was entered, though the cause was remanded to the United States circuit court for execution of the judgment, since the order of the circuit court upon the remandment, in entering the final judgment of the circuit court of appeals and carrying it into effect, would throw no light on the matters adjudicated. (*Post*, pp. 720, 728.)

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County.—M. M. ALLISON, Judge.

BURKETT, MILLER, MANSFIELD & SWAFFORD, for plaintiff.

BROWN & SPURLOCK and WATKINS & THOMPSON, for defendants.

MR. JUSTICE SHIELDS delivered the opinion of the Court.

The plaintiff, J. N. Moore, sues the defendants, the Chattanooga Electric Street Railway Company, a corporation owning and operating a street railway upon the streets of Chattanooga, and the East Tennessee Telephone Company, a corporation owning and operating telephone lines upon the streets of that city, for injuries sustained by him while acting as conductor, in

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the employ of the Chattanooga Electric Railway Company, by coming in contact with a pole erected by the East Tennessee Telephone Company in the street near to, but not upon, the right of way of the street railway company. The plaintiff avers in his declaration the erection and maintenance of the telephone pole by the telephone company upon the street, and that it was also used by the street railway company in the conduct of its business; that, while he had been in the service of the company as conductor for some time, he had only recently been placed on duty where he was injured; that the pole in question was near a crossing of a commercial railway, where his duties required him to alight from the car and conduct it across that railway; that having discharged this duty, and while on the rear platform of his car he had cause to believe that the wheel of the trolley pole had or was about to leave the trolley wire, and that he leaned out from the platform, on the side on which said pole was erected, to observe the trolley pole, in order that he might, in the discharge of his duty, take the necessary steps to place it in order, and that while in this position his head came in contact with the pole, injuring him severely; and that because of the short time he had been on this line he had not had time to measure the distance of the pole from the car, and did not appreciate the danger arising from its proximity to the cars of the street railway company. These are substantially the averments of the declaration.

The street railway company demurred, setting forth

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four grounds of demurrer. The first three are substantially the same—that is, that it appears upon the face of the declaration that the telephone pole was not upon the right of way of the defendant, but upon a street of the city; that it was not erected or maintained by the defendant, but by another, for whose acts it was not responsible; and that this defendant owed the plaintiff and the public no duty to remove it. The fourth ground of demurrer is that it appears from the averments of the declaration that the plaintiff sustained his injuries in consequence of his own negligence. The trial judge sustained the first three grounds of demurrer, but overruled the fourth. All of them are now before this court by proper assignments of error.

The defense made by the telephone company is entirely different, and we will dispose of that of the street railway company before stating it.

We think all the grounds of demurrer of the railway company should have been sustained.

The declaration contains no averment that the pole was erected by the street railway company, or that it stood upon its right of way. On the contrary, it appears that it was erected by the telephone company in the street and outside of the right of way. The railway company was, therefore, not responsible for its erection and maintenance, and owed no one the duty to remove it. The averment that after its erection it was used by this company jointly with the telephone company does not make it liable. It was the pole of

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the telephone company, in its possession and under its control, and the railway company had no power or authority to remove it, and was under no obligation to do so. It is true that if one erects a nuisance in a public street, and another adopts and maintains it, both are liable; but the mere use of it by the second party, without power or authority to abate it, and when he is prevented from so doing by the party erecting it and continuing to use it in his own business, will not make such second party liable to others who sustain injuries from the nuisance. One cannot be held responsible for a nuisance erected and maintained by another, which he does not control and cannot abate.

This is the second suit against this company by the plaintiff upon this same supposed cause of action. The first was before this court, and it was then held, upon the facts disclosed in that record, that the defendant was not liable for the erection and maintenance of this pole, and the judgment which plaintiff had recovered was reversed, and the cause remanded to the lower court, where it was dismissed by the plaintiff. While there are some differences in the averments of the declarations, they are not material. The former case, under the style of "*Chattanooga Electric Railway Co. v. Moore*," is reported in 113 Tenn., 531, 82 S. W., 478.

We are also of the opinion that the plaintiff's own negligence was the proximate cause of the injuries sustained by him. It appears from the averments of the

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declaration that the pole was such an obstruction and in such position that it would necessarily come under the plaintiff's observation, and that he must have known, or by the exercise of ordinary care could have known, of its existence and location. The danger of coming in contact with it while leaning from the car was obvious and apparent. The averment that he did not know and appreciate the dangers arising from the nearness of the pole to the cars can avail nothing. It was apparent to any one of ordinary comprehension, certainly to one who assumed to be capable of discharging the duties of the position of conductor. There is no averment that he had not seen the pole, or did not know it was there; and it is fairly presumable from the averments of the declaration that he had such knowledge, certainly that he had ample opportunity to acquire it. In cases of this character knowledge is imputed to the employee. The law is well settled that if the danger is obvious, and the employee or servant has sufficient discretion and opportunity to see and avoid it, the employer or master cannot be held for any injury sustained. Wood's Law of Master and Servant, sec. 349; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn., 239, 61 S. W., 53.

Continuing in the service of the defendant, with knowledge or inexcusable ignorance of this obstruction and the necessary danger attending it, was also an assumption of the risk of such danger which would bar the recovery in this case, if this defendant was chargeable with wrongful conduct in the erection and maintenance

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of the pole. This has been so held in a number of cases in which the facts were very similar to those of the one at bar. *Jennings v. Tacoma Railroad Co.*, 7 Wash., 275, 34 Pac., 937; *Drake v. Auburn City Railway Co.*, 173 N. Y., 466, 66 N. E., 121; *Ladd v. Bracton Street Ry. Co.*, 180 Mass., 454, 62 N. E., 730.

The defense made by the East Tennessee Telephone Company was former judgment in a suit upon the same cause of action in its favor. The plaintiff to this plea replied, "Nul tiel record." The issue was tried by the court, found in favor of the defendant, and the suit dismissed. The plaintiff also prosecutes an appeal in the nature of a writ of error from this judgment.

The plea of former judgment of the defendant averred, in substance, that previous to the bringing of this action the plaintiff brought another suit against this defendant for the same cause of action in the circuit court of Hamilton county; that upon proper petition, on account of diverse citizenship, the case was removed to the circuit court of the United States for the southern division of the eastern district of Tennessee, where it was tried upon its merits and dismissed, and that upon proper proceedings in error taken by the plaintiff to the circuit court of appeals of the United States for the sixth circuit of the United States, sitting at Cincinnati, Ohio, it was there finally heard and determined upon its merits, and final judgment entered against the plaintiff, affirming the judgment of the circuit court dismissing the suit. The plea is formal, full, and contains all the necessary allegations of such a

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pleading.

Upon the trial of the case, when the defendant offered in evidence, in support of this plea, a transcript of the record in the case referred to from the circuit court of appeals of the United States, the plaintiff objected to the introduction and consideration of it as evidence, upon grounds as follows:

(1) Because same was not the best evidence; that the primary or best evidence, according to defendant's own showing, was a transcript from the United States court of Chattanooga, Tennessee.

(2) Because the transcript offered, according to its own showing, was not a full, final, and complete record of the proceedings in the United States circuit court of appeals.

(3) Because the transcript aforesaid is in a suit between one J. N. Moore and the East Tennessee Telephone Company, only, whereas the present suit is between the plaintiff and two defendants.

(4) Because the cause of action contained in the present suit is not the same cause of action contained in the former suit.

(5) Because there is no proof that either the party plaintiff or parties defendant are the same.

These objections were overruled, and the record admitted. This was all the evidence. The assignment of errors challenges the action of the trial judge in overruling the objections of the plaintiff to the evidence at his finding upon the issues joined.

We find no error in the judgment of the trial court

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1. The point made that the parties to the two suits are not the same, because the Chattanooga Electric Railway Company also is a defendant in this case, is not sound.

The general rule, that in order to sustain a plea of this character it must appear that the parties are the same and that they sue and are sued in the same capacity, does not apply to this case. The plaintiff in an action of tort may sue all the tort feorsors jointly, or he may maintain separate actions against each of them, and, whether the action be joint or separate, he is entitled to recover full damages against all of the parties guilty of the tort. *Swain v. Tennessee Copper Company*, 111 Tenn., 433, 78 S. W., 93. It is said in *Railroad v. Jones*, 100 Tenn., 515, 45 S. W., 682:

"The general rule established by an unbroken line of authorities is that when a plaintiff sues the joint tort feorsors, or any number less than all, for an injury, he is entitled to a verdict for full compensation against all of the defendants when he succeeds in convicting them of the wrong, without regard to the degree of guilt of each defendant. So far as he is concerned, each joint tort feorsor is bound to compensate him for the full injury sustained, whatever may be the grade of the offense as between themselves."

While the plaintiff in such cases has the right to bring joint or separate actions, he is bound by his election, and, if he sue all in one suit, he cannot, after judgment, sue them separately; nor can he first bring suits against them separately, or against part of them

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only, and then, after judgment, maintain a new action against one sued separately by merely joining others therein. It would be unjust and an abuse of the process of the courts to allow this to be done, since in one action he can, if entitled, recover full damages. The action being joint and several, every question possible is involved, and full relief can be had. In this case, as far as this defendant is concerned, the plaintiff has no broader or further right of action than he had in the former case, and the defendant can rely upon and maintain no defense that he could not in the former suit. The former action and this one are, as to these parties, in all respects identical, and a judgment, if upon the merits, in the former suit is conclusive in this as to this defendant.

In 2 Black on Judgments (2d Ed.), sec. 777, it is said: "The plaintiff, who is injured by a tortious act shared in by several, must elect whether he will prosecute them all in joint action, or sue one or more separately. He cannot do both. Courts everywhere in this country agree that the injured party in such a case may proceed against the wrongdoers jointly, or he may sue them all, or any one of them, separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue any one of them separately, or if he sues them separately, and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of the law, an election on his part to pursue his several remedies."

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Mr. Freeman, in his work on Judgments (4th Ed.), vol. 1, sec. 236, says:

"Suing trespassers, or any of them, severally, is conclusive election to consider the trespasses as several, and is a bar to a joint action subsequently instituted."

Other authorities are to the same effect: 1 Jaggard on Torts, sec. 343; *Sessions v. Johnson*, 95 U. S., 347, 24 L. Ed. 596.

2. The transcript of the record in *J. N. Moore v. East Tennessee Telephone Co.*, 142 Fed., 965, 74 C. Cl. A., 227, from the United States circuit court of appeals, of itself proves the plea of former adjudication relied upon by the defendant.

The replication to the plea is "*Nul tiel* record." There is no replication that the parties to the two cases and the cause of action sued on in them, respectively, are not the same. The only issue made is whether there exists such a record as is set forth in the plea, and this is one to be tried by the court by an inspection of the record offered in evidence by the defendant. The burden to establish the plea of former adjudication is upon the defendant; but, when he has produced and placed in evidence the record relied upon in the plea, he has made out a *prima facie* case, if it appear from an inspection of that record with reasonable certainty that the parties to that case and the cause of action there sued upon are the same as those in the case on trial. It is only where these facts do not so appear that further evidence is required to sustain the plea. *Williams*

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v. *Hollingsworth*, 5 Lea, 360; *Ridley v. Buchanan*, 2 Swan, 559; Black on Judgments, 630, 631; *Packet Company v. Sickles*, 5 Wall., 592, 18 L. Ed., 550.

The record introduced in evidence discloses that in that case J. N. Moore, a conductor of the Chattanooga Electric Street Railway Company, was plaintiff, and that the East Tennessee Telephone Company, a corporation owning and operating telephone lines in the city of Chattanooga, was the defendant, and the averments of the declaration found in that record are substantially the same as those in the declaration filed in this case in all material details and particulars. It is thus proven that the parties to the two cases and the cause of action sued upon in both of them are identical and the same. There can be no question but that this is sufficient to make out a *prima facie* case of the identity of the parties and the cause of action.

There is nothing in the insistence that the declaration in this case contains averments of negligence upon the part of the defendant not found in the former suit. The wrong done is the cause of action, and it is the same in both cases, notwithstanding there may be a difference in the averments of negligence in the two declarations. It was the duty of the plaintiff to present his entire case in the first suit brought and prosecute it to judgment, and if he failed to do so it was his own fault.

3. The judgment of the circuit court of appeals of the United States in the former suit was a final judgment upon the merits.

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The contention of the plaintiff that this judgment is not final seems to be predicated upon the form and language of the mandate of the court to the circuit court, rather than upon the judgment entered. The judgment is in these words:

"This cause came on to be heard upon the transcript of the record from the circuit court of the United States for the eastern district of Tennessee, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said court in this cause be, and the same is hereby, affirmed, with cost."

The court had jurisdiction to enter a final judgment. The sixth section of Act Cong. March 3, 1891, ch. 517, 26 Stat., 828 (U. S. Comp. St., 1901, p. 549), in relation to the jurisdiction of this court is as follows:

"That the circuit court of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts in all civil causes other than those provided for in the preceding sections of this act, unless otherwise provided by law, and the judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to a suit or controversy being aliens and citizens of the United States or citizens of different States."

The mandate is provided for by the last paragraph of section 10 of the same act, and is merely for the pur-

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pose of having the final judgment of the court executed. That paragraph is in these words:

"Whenever on appeal or writ of error or otherwise, a case coming from district or circuit court shall be reviewed and determined in the circuit court of appeals, in a case in which the decision of the circuit court of appeals is final, such cause shall be remanded to the district or circuit court for further proceeding to be there taken in pursuance of such determination."

The judge of the circuit court cannot open the case when it is remanded. He cannot in any way modify the judgment of the higher court. He has no judicial function to exercise in the matter. He cannot exercise any discretion. All that can be done is to execute the judgment of the appellate court, and this is merely a ministerial act. *Wabash R. R. Co. v. Tourville*, 179 U. S., 326, 21 Sup. Ct., 113, 45 L. Ed., 210; *Winthrop Iron Co. v. Meeker*, 109 U. S., 181, 3 Sup. Ct., 111, 27 L. Ed., 898; *Mower v. Fletcher & Bicknell*, 114 U. S., 128, 5 Sup. Ct., 799, 29 L. Ed., 117.

As to the merits, the plaintiff had presented in his declaration all the facts upon which he claimed he was entitled to the recovery against the defendant for the injuries sustained by him. The demurrer interposed by the defendant admitted these facts, and submitted to the court whether upon them the plaintiff in law was entitled to maintain his action, and it was held that he could not. The opinion of the circuit court of appeals, in the former case may be looked to to ascertain the

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point upon which it was decided, and to determine whether the decision was upon the merits. *Fowlkes v. State*, 14 Lea, 14; *State v. Bank*, 96 Tenn., 595, 36 S. W., 719.

In that opinion it is said: "This action was for damages arising from personal injury resulting from alleged negligence of the defendant in locating one of its poles in too close proximity to the line of the electric railway upon which the plaintiff was employed as conductor. The action was dismissed upon demurrer to the declaration, the plaintiff having elected not to plead therein. The judgment of the court below must be affirmed. We think the demurrer was properly sustained—not for the reasons stated by the court below, but for the reasons stated in the third ground of demurrer, which is because the plaintiff's declaration shows that the proximate cause of his injury was his own negligence."

It clearly appears from this that the former case was not dismissed for any defect in the pleadings, or other question not going to the right of the plaintiff to maintain his action, but because upon his own statement of the facts he had no cause of action against this defendant. The judgment, although upon demurrer, was upon the merits, and is sufficient to support a plea of former judgment. *Peeler v. Norris*, 4 Yerg., 331; *Welsh v. Harmon*, 8 Yerg., 103; *Thomson v. Blanchard*, 2 Lea, 528; *Hodson v. Caldwell*, 1 Lea, 50; *Murdock v. Gaskill*, 8

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Baxt., 22; *Grotenkemper v. Carver*, 4 Lea, 375; *Parkes v. Clift*, 9 Lea, 524.

4. The transcript of the record came from the proper court. The case was finally decided, as we have seen, in the circuit court of appeals, and a transcript of the record in that court is a full and complete record of the case. The order of the circuit court, in entering the decree of the higher court and carrying it into effect, amounts to nothing more than an execution. In this case it was simply a formal judgment for cost against the plaintiff, in compliance with the direction of the higher court, and the award of an execution. A copy of these proceedings would throw no light upon the matters adjudicated. The questions decided dispose of all the errors assigned.

There is no error in the record, and the judgment dismissing plaintiff's suit is affirmed, with costs.

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THIRD NATIONAL BANK OF ST. LOUIS *v.* W. P. HAYS *et al.*

(*Knoxville*. September Term, 1907.)

1. **BILLS AND NOTES.** Purchaser of draft with bill of lading attached is vested with special property in the goods becoming absolute on drawee's refusal to pay.

When the seller and shipper of property contracted to be sold consigns the same to his order with instructions to the common carrier to notify the proposed purchaser at the destination of the shipment, and for the purchase price draws on the purchaser of the property a draft payable to the bank or person purchasing the same, to which draft is attached the bill of lading indorsed in due course, a special property in the goods embraced in the bill of lading passes to the said payee and purchaser of the draft, subject to be divested by the acceptance and payment of the draft, and on the drawee's refusal to accept and pay the draft, the title of the holder of the draft becomes absolute. (*Post*, pp. 731-738.)

Cases cited and approved: Means v. Bank, 146 U. S., 620, with its numerous citations shown on pages 737 and 738, and numerous other cases cited on pages 736 and 738.

2. **BILLS OF LADING.** Holder is entitled to property embraced therein against all subsequently acquired liens.

The delivery of a bill of lading is a symbolic delivery of the property which it represents, and the holder of a bill of lading has constructive possession of the property embraced therein, and may hold it against all persons acquiring liens subsequent to the transfer of the bill of lading. (*Post*, pp. 738-742.)

Cases cited and approved: Ochs v. Price, 6 Helsk., 488, 487, (citing Curry v. Roulstone, 2 Overt., 110; Kirkman v. Bank, 2 Cold., 403); Cornick v. Richards, 3 Lea, 25; Lewis v. Small, 117 Tenn., 155; Bank v. Bank, 91 U. S., 98.

Cases cited and distinguished: Saunders v. Bartlett, 12 Helsk., 316 (citing Woodruff v. Railroad, 2 Head, 94); Oliver v. Moore, 12 Helsk., 482.

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3. SAME. Case in judgment involving questions in both of the foregoing headnotes.

The seller and shipper of property contracted to be sold consigned the same to his own order with instructions to the common carrier to notify the proposed purchaser at the destination of the shipment, and for the purchase price drew on the purchaser of the property a draft payable to the bank purchasing the same, to which draft was attached the bill of lading indorsed in due course. The draft was purchased by the bank by giving the drawer credit for the net proceeds who checked against that credit in the regular way. The seller, shipper, and drawer was active in attempting to prevent the diversion of the goods from the claim of the bank to the claim of his subsequently attaching creditors.

Held: That the bank had a special property in the goods entitling it to maintain the replevin suit and to recover the amount of the draft against the drawee and purchaser who had attached for an alleged previously existing claim in so far as necessary to make one satisfaction of the amount of the draft.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.

—T. M. McCONNELL, Chancellor.

CHAMBLISS & CHAMBLISS, for complainant.

RICHLAND, CHAMBERS & COOPER and F. S. YAGER, for defendants.

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MR. JUSTICE MCALISTER delivered the opinion of the Court.

This is a replevin bill, brought by the complainant bank to recover the possession of two cars of rye which had been attached as the property of the Young & Fresch Grain Company, a partnership of St. Louis, Mo. The grain in suit had been sold by the grain company to the Chattanooga Feed Company and T. H. Cheek & Co., of Chattanooga. This grain was attached on its arrival in Chattanooga by the firm of T. H. Cheek & Co. to satisfy an alleged indebtedness against said nonresident grain company. The Third National Bank of St. Louis, Mo., is asserting its right to the possession of said rye as purchaser of sight drafts drawn by the grain company, to which bills of lading were attached, against the vendee at Chattanooga.

T. H. Cheek & Co., the real party defendant to the bill, filed an answer and cross bill, averring:

"Defendant, on information and belief, denies that complainant purchased of the Young & Fresch Grain Company two certain drafts dated August 24, 1903, one for \$570, drawn on the Chattanooga Feed Company, the other for \$573, drawn on T. H. Cheek & Co., but admits that such drafts were drawn, with bills of lading attached, calling for two cars of rye referred to in the first paragraph of complainant's bill; but defendant avers and charges, on information and belief, that said drafts, with bills of lading, were simply discounted by said complainant bank to accommodate its customer, the

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said Young & Fresch Grain Company, and that said bank is not a *bona fide* purchaser of the drafts, but that the said Young & Fresch Grain Company, a customer and depositor of said bank, is the real party in interest, and is responsible for backing the lawsuit of complainant, and employed and paid counsel in the cause, and indemnified complainant, who is only a nominal party, and not the real owner of the drafts. It admits that the drafts were forwarded through the mail to Chattanooga for collection, and avers that complainant bank acted as collection agent of said Young & Fresch Grain Company to said defendant, who had instituted the two suits herein referred to, attempting to collect said indebtedness, and attached the grain as the property of said firm on account of said indebtedness, which will more fully hereinafter appear. Defendant denies that complainant is entitled to or ought to have possession of the rye, and does not know whether the two cars were reasonably worth \$1,143, or less, but denies that complainant has either title or lawful rights of possession."

Cheek & Co. then proceeded by the cross bill to set up a claim for damage against the Young & Fresch Grain Company arising out of the purchase of six car loads of corn in May, 1903, and seeking to subject the two car loads of rye attached herein to the satisfaction of said claim for damages. Proof was taken, and on the final hearing the chancellor, being of opinion that complainant bank was not entitled to the possession

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of said two car loads of rye, or to the proceeds arising from its sale, dismissed the bill. He sustained the cross bill of Cheek & Co., and awarded said firm a decree against the Young & Fresch Grain Company, or rather F. M. Young, the surviving member of said firm, for the sum of \$1,446.41, with costs. The complainant bank appealed, and has assigned errors as follows:

(1) In dismissing complainant's bill, and in failing to decree the right of possession to the property replevined to be in complainant bank.

(2) In decreeing that cross-complainants were entitled to the proceeds of the two cars of rye replevined herein.

The facts disclosed in the record are that the Young & Fresch Grain Company, of St. Louis, Mo., consigned to their own order at Chattanooga, Tenn., two car loads of rye, with instructions to the carrier to notify the proposed purchasers, the Chattanooga Feed Company as to one car, and the said T. H. Cheek & Co. as to the other, as shown by the respective bills of lading issued by the carrier. The grain company drew sight drafts against this rye in favor of the Third National Bank of St. Louis, Mo., and attached thereto the bills of lading for the consignment of rye. These drafts were purchased by the complainant bank, and said grain company was given credit therefor by the bank, and checked against that credit in the regular way. According to the weight of the testimony, there was a straight purchase of these drafts by the bank; the drawers thereof

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reserving no interest in the property represented by the bills of lading. These sight drafts were sent, with the bills of lading attached, to the Citizens' Bank & Trust Company of Chattanooga for collection. On the arrival of the shipment of rye, it was attached by T. H. Cheek & Co., and impounded to satisfy, an alleged indebtedness growing out of an independent corn transaction.

The question of law arising on the record is in respect of the superiority of the respective claims to the rye or its proceeds, propounded by complainant bank on the one side and the attaching creditor of the grain company on the other. It is said on behalf of Cheek & Co. that "the title to goods does not pass to the purchasers on their delivery on board cars, where the seller consigns them to his own order at the place of final delivery."

It is said the grain company both reserved and exercised the *jus disponendi* over said rye, and that at the time it was attached it was the property of the nonresident grain company, and therefore subject to be impounded for the satisfaction of an indebtedness due Cheek & Co.

It is said on behalf of the defendant that the discount of said drafts at St. Louis created no lien on the shipment of rye, and that complainant bank was simply a creditor at St. Louis of the grain company, with no rights superior to Cheek, who was a creditor at Chattanooga. The argument is that the property in the

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rye, when shipped, remained in the grain company, and it was then simply a race between the two creditors to fix a lien or acquire the actual possession of the rye. It is then said that defendants Cheek & Co. caused their attachment to be levied, and thus fixed a lien on the property before complainant bank ever acquired actual possession under its bill of lading.

In this contention we do not concur. In 6 Cyc., p. 426, it is said: "If the bill of lading is accompanied by draft on the consignee, and there is some reservation in the bill of lading of *jus disponendi*, the consignee does not become entitled to the possession of the goods until he accepts or pays the drafts in accordance with the terms imposed by the shipper; and an intermediate party, such as a banker purchasing the draft accompanied with the bill of lading, has a right to the goods as security until the consignee accepts or pays as the case may be. Such a transaction passes to the transferee of the draft and bill of lading a special title in the goods, and he has a better right thereto than one claiming under a prior or subsequent agreement with the shipper, but without having obtained actual or constructive possession of the goods."

In 4 American & English Encyclopedia of Law (2d Ed.), p. 548, it is said: "Where the consignor draws upon his consignee for the purchase money, and the draft, with bill of lading attached, is indorsed or transferred to some one who discounts the bill of exchange, a special property in the goods thereby passes to the

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transferee, subject to be divested by the acceptance and payment of the draft; and, if the consignee refuses to accept the draft, the title of such transferee becomes absolute."

Again it is said: "While the transfer of bills of lading may pass title to the goods, unless the common law has been modified by statute, these instruments are not negotiable in the sense in which the term is applied to bills and notes and other negotiable instruments of a like character. Although it has sometimes been said that a bill of lading is negotiable, nothing more is meant by this than that the transfer of the bill of lading passes to the transferee the title of the transferer to the goods described therein." *Id.*, p. 549; *Thompson v. Dominy*, 14 M. & W., 403; *Baltimore R. R. Co. v. Wilkens*, 44 Md., 11, 22 Am. Rep., 26; *Douglas v. People's Bank*, 86 Ky., 176, 5 S. W., 420, 9 Am. St. Rep., 276.

Again, in 22 Am. & Eng. Encyc. of Law (2d Ed.), p. 858, it is said: "The property represented by the bill of lading may be pledged by the delivery of the bill of lading, because an assignment of such instrument gives to the assignee the means of obtaining possession. In the law of pledges, nothing is better settled than that the pledgee has a right to the possession of the property pledged until the payment of the debt secured. His right of possession is exclusive, and it yields to no other right which did not before the making of the pledge attach to the property." *Means v. Ran-*

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dall Bank, 146 U. S., 620, 13 Sup. Ct., 186, 36 L. Ed., 1107; *Brent v. Miller*, 81 Ala., 309, 8 South., 219; *Newcomb v. Boston R. Corp.*, 115 Mass., 233; *Willeys v. Hatch*, 132 N. Y., 41, 30 N. E., 251, 17 L. R. A., 193.

In *Means v. Randall Bank*, supra, it was said: "As to the four car loads named in the bill of lading, that instrument represented the cattle; and the transfer of the ownership, as well as of the right of possession, was made as effectually by the transfer of the bill as it would have been by the physical delivery of the cattle." *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.), 386, 485, 17 L. Ed., 189; *Dows v. National Exchange Bank*, 91 U. S., 618, 23 L. Ed., 214.

"When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser, so far as the exercise of those rights was necessary to protect the holder." *Halsey v. Warden*, 25 Kan., 128; *Emery v. Bank*, 25 Ohio St., 360, 18 Am. Rep., 299; *Dows v. National Exch. Bank*, 91 U. S., 618, 23 L. Ed., 214; *Bank v. Homeyer*, 45 Mo., 145, 100 Am. Dec., 363; *Bank of Green Bay v. Dearborn*, 115 Mass., 219, 15 Am. Rep., 92; *Bank of Rochester v. Jones*, 4 N. Y., 497, 55 Am. Dec., 290; *Holmes v. German Security Bank*, 87 Pa., 525.

"The bank which makes advances on a bill of lading has a lien to the extent of the advances on the property in the hands of the consignee, and can recover from him the proceeds of the property consigned, even though the

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consignor be indebted to the consignee on general account; and the consignee cannot appropriate the property or its proceeds to his own use in payment of a prior debt." *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.), 386; *Gibson v. Stevens*, 8 How., 384; 12 L. Ed., 1123; 3 Parsons on Contracts, 487; *Shaw v. Merchants' Nat. Bank*, 101 U. S., 557, 25 L. Ed., 892; *Yeatman v. N. O. Savings Inst.*, 95 U. S., 764, 24 L. Ed., 589; *Merchants' Nat. Exch. Bank v. McGraw*, 76 Fed., 934, 22 C. C. A., 622; *Schmidt v. First Nat. Bank*, 10 Colo. App., 261, 50 Pac., 733; *Fidelity Ins. Co. v. Roanoke Iron Co.* (C. C.), 81 Fed., 442; *Tuttle v. Exchange Bank*, 90 Ga., 656, 16 S. E., 955.

To the same effect are the Tennessee authorities. The delivery of the bill of lading is the symbolic delivery of the property which it represents. It was said in *Cornick v. Richards*, 3 Lea, 25: "Indorsement of a bill of lading is held a good delivery in performance of a contract of sale, so as to defeat any action by the buyer against the vendor for nondelivery of the goods"—citing 5 Wait's Actions & Defenses, p. 578.

In *Ochs et al. v. Price*, 6 Heisk., 487, it was said: "A transfer and delivery of a bill of lading vests the property in the transferee, being regarded in law as a constructive delivery of the property itself"—citing 1 Parsons on Contracts, 485; 2 Parsons on Contracts, 639; *Curry v. Roulstone et al.*, 2 Overt., 110, Fed. Cas. No. 3, 497; *Kirkman v. Bank of America*, 2 Cold., 403.

As opposed to these authorities counsel for Cheek &

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Co. cite the case of *Saunders v. Bartlett*, 12 Heisk., 316, in which it appeared that: "Joyner & Son were indebted to the defendants, and it was agreed that the former should ship the bale of cotton in this case to the latter, by whom its proceeds when sold should be appropriated to the payment of the debt. The cotton was accordingly shipped to Bartlett, Gould & Heath, as cotton factors, to be sold for this purpose. When the boat on which it was shipped arrived at the wharf at Memphis, the bill of lading was sent to Bartlett, Gould & Heath; but before anything was done by them to reduce the cotton to possession it was attached by Saunders, whereupon the factors replevied it in this suit." Said the court: "We take it to be clear that the consignors were the owners of the property. It was not a sale. The factors had no lien, either general or special, on the cotton, without actual or constructive possession. The possession of the bill of lading was not such a possession of the cotton in this case. It only gave the authority to reduce the cotton to possession as consignees"—citing *Woodruff v. N. & C. R. R. Co.*, 2 Head, 94. See, also, *Oliver v. Moore*, 12 Heisk., 482.

An analysis of these cases will show that they really enunciate principles that apply to a case of factorage, and not to a case where the bill of lading has been pledged as security for an indebtedness either antecedent or concurrent. The principles of law announced, so far as they apply to a case of factor, are unquestioned; but they are inapplicable to the case of a purchaser of a ne-

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gotiable sight draft, to which bill of lading covering the property is attached, for in such cases the law undoubtedly is that the holder of the bill of lading has constructive possession of the property and may hold it against all persons acquiring liens subsequent to the transfer of the bill of lading.

This question was incidentally involved in the case of *Lewis, Leonhardt & Co. v. Small*, 117 Tenn., 155, 6 L. R. A. (N. S.), 887. The facts were that Lewis, Leonhardt & Co., who resided at Knoxville, Tenn., contracted to buy from W. H. Small & Co., who resided at Evansville, Ind., ten car loads of No. 1 timothy hay at \$15 per ton f. o. b. cars at Knoxville. W. H. Small & Co. shipped ten car loads of hay to Knoxville on bill of lading issued to their own order. They drew sight drafts on Lewis, Leonhardt & Co., payable to themselves, and attached one of said bills of lading to each of said drafts. They sold all of said drafts to the Citizens' National Bank of Evansville, Ind., for full value and in the due course of trade, and these drafts were sold in turn by said bank to the Fourth National Bank of Cincinnati, Ohio, and by it to the Mechanics' National Bank of Knoxville, Tenn., for full value and in due course of trade. The Mechanics' National Bank presented the drafts to Lewis, Leonhardt & Co. for acceptance and payment, and they accepted and paid them all, and the drafts were delivered to them. When Lewis, Leonhardt & Co. unloaded the hay, they discovered that it was not No. 1 timothy hay, and that it was worth \$300 less than

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the hay they had contracted to buy. Thereupon they brought this suit, and attached the money that they had paid to the Mechanics' National Bank on the drafts. They charged that the money belonged to W. H. Small & Co., and the Fourth National Bank of Cincinnati, the Mechanics' National Bank of Knoxville, and W. H. Small & Co., were all liable to them for the breach of the contract by W. H. Small & Co. to ship them No. 1 timothy hay, and they prayed for a decree against all of the defendants for said sum of \$300. The court said:

"The theory of complainants, which was adopted by the lower courts, is that when the defendant banks purchased said drafts they became the owners of the hay and responsible for the performance of Small & Co.'s contract for its sale as to quality, quantity, and delivery, and are liable for damages to the purchaser for Small & Co.'s breach of the contract in any of said respects, although the drafts were negotiable and said banks are innocent purchasers thereof, and on presentation to the drawees, Lewis, Leonhardt & Co., they unconditionally accepted and paid the drafts."

This court held this view erroneous, saying: "They proceed upon the incorrect theory that the bill of lading so vests the property in the indorsing banks that they are substituted to all the liabilities of the original drawer, and are the absolute owners of the property, while the true rule is that the indorsing banks, hold the bills of lading simply as collateral to secure the drafts drawn against them," etc.

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This court further said: "There is nothing in this holding contrary to the cases of *Ochs v. Price*, 6 Heisk., 484, nor *National Bank v. Merchants' Bank*, 91 U. S., 98, 23 L. Ed., 208."

In the case last cited the purchasers of the drafts, of course, did not have actual possession of the property; but they did have its constructive possession by the assignment or transfer of the bill of lading, and, while they did not become purchasers of the property, they were pledgees of the property as collateral security for the payment of the drafts.

If the collection of drafts with bills of lading attached could be defeated by the attachment of creditors after the purchase of the drafts, the commerce of the country would be seriously obstructed. As said in *Leonhardt v. Small*, supra:

"It is a fact of common knowledge that a large part of the commercial business of the country is carried on through the medium of drafts, and that the immense crops of the South and West are marketed under contracts to draw for the purchase price, with bills of lading attached. If the courts shall adopt the rule insisted upon by the complainants, it will result in destroying this convenient method of handling, moving, and paying for the crops of the country; for the banks will necessarily be compelled to refuse to buy drafts with bills of lading attached, or to handle them as collateral security or otherwise."

It is said, however, on behalf of cross-complainants,

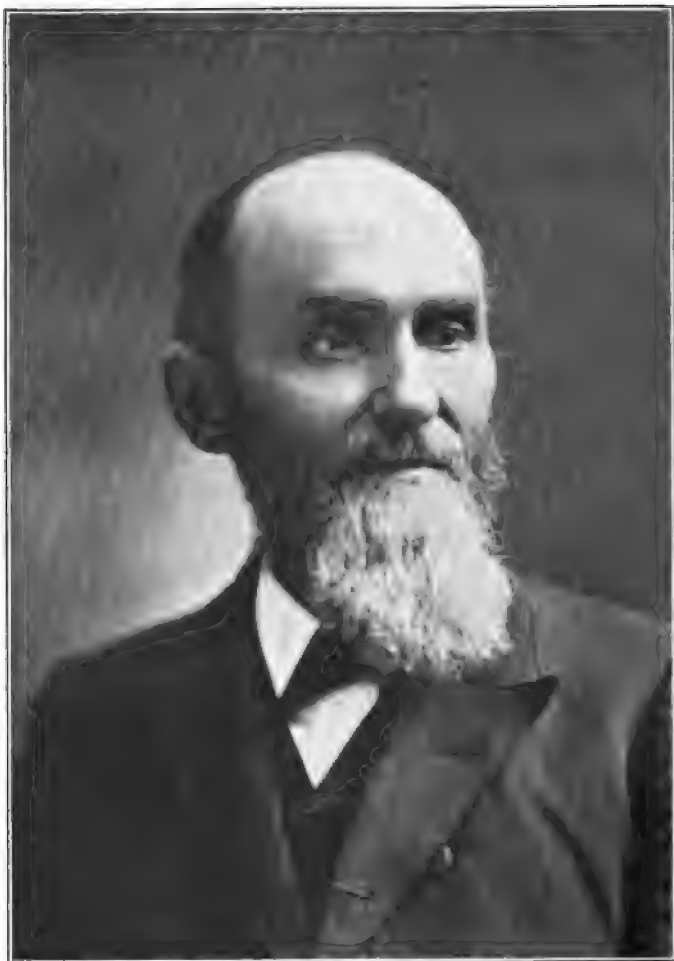
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that the transaction between the complainant bank and the grain company was merely colorable, that there was no purchase of the drafts by the bank, but it was simply acting as the collecting agent of the grain company. Counsel in brief undertakes to reinforce this position by the citation of numerous telegrams from the grain company in St. Louis to the feed company and others in Chattanooga, wherein it is claimed the grain company holds itself out as the owner of the rye and offers to sell it at a discount from the prices originally fixed. It is said this evidence shows that the complainant bank was not the owner of the rye, but that the title and ownership of the same was still reserved to the grain company. It is true, as insisted, the complainant bank was not the owner of the rye, but held it under the bills of lading as security for the payment of the drafts. The grain company was, of course, interested in seeing that the bank should get the benefit of the security, since the grain company would, of course, be liable to the bank for any default in the collection of these drafts. It was, therefore, natural that the grain company should have been active in trying to prevent the diversion of the rye from the claim of the bank to the claims of attaching creditors. It is not true, as alleged in the answer, that the grain company employed counsel at Chattanooga and became responsible for the compensation of that firm in resisting the attachment of Cheek & Co.; but as a matter of fact this firm was employed by the complainant bank, and replevied the rye, and then sold it on account of said bank.

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It is shown by the bank's cashier that the drafts were not taken for collection, but were purchased outright from the Young & Fresch Grain Company who were given credit therefor, and who checked against that credit. He further testified that there were no special instructions given; that the bank made the purchase of the drafts on August 24, 1902, and paid the Young & Fresch Grain Company for them. F. M. Young, a member of the grain company, testified that his firm sold these two drafts to the Third National Bank, receiving the proceeds, and then and there delivered, assigned, and transferred the drafts and bills of lading attached to the bank. He also states that his firm has had no interest therein since that date. It is alleged in the bill that these drafts were purchased in due course of trade. The answer admits that the drafts were drawn against these cars, that the bills of lading were attached, and that the drafts were discounted by the said complainant bank to accommodate its customer, the Young & Fresch Grain Company. The drafts on their face were payable to the complainant bank, with the bills of lading attached and indorsed in due course.

We are of opinion that defendants Cheek & Co. have failed to establish the averments of their answer and cross bill, and that upon the record complainant is entitled to recover the amount of the two drafts, with interest. The decree of the chancellor will therefore be reversed, and a decree entered here in accordance with this opinion. Defendants will pay the costs of the appeal.



JOHN S. WILKES,
Associate Justice Supreme Court of Tennessee,
1893—1908.

A Tribute

TO THE MEMORY OF

HON. JOHN S. WILKES,

Late one of the Associate Justices of the Supreme Court
of Tennessee.



URSUANT to a call for a meeting of the Bar of the State, through the public press, to take appropriate action regarding the death of that beloved and distinguished jurist, the Honorable John S. Wilkes, who died on Sunday morning, February 2, 1908, members of the bar from different sections of the State met in the Supreme Court room at the State Capitol on February 4, 1908.

On motion, the Hon. W. D. Beard, Chief Justice of Tennessee, was chosen to preside over the meeting, and Joseph J. Roach, Esq., was elected secretary. After appropriate remarks from different members of the bar present, the chair was authorized to appoint a committee from the bar of the State to draft suitable resolutions expressive of the high regard and esteem in which Mr. Justice Wilkes was held; whereupon the following named members of the bar were appointed, to wit: D. L. Snodgrass, Chairman, Chattanooga; James C. Bradford, Nashville; W. C. Caldwell, Trenton; J. J. Vertrees, Nashville; Jerome Templeton, Knoxville; Luke E. Wright, Memphis; J. H. Henderson, Franklin; Flournoy Rivers, Pulaski; C. G. Bond, Jackson; Grainger Latta, Dyersburg; S. G. Shields, Knoxville; Samuel J. Kirkpatrick, Jonesboro; C. W. Tyler, Clarksville; W. T. Smith, Sparta; A. W. Biggs, Memphis; L. B. McFarland, Memphis; J. A. Susong,

Greeneville; Robert Burrow, Bristol; E. H. Hatcher, Columbia; J. M. Anderson, Nashville; J. A. Pitts, Nashville; Foster V. Brown, Chattanooga.

Said committee was authorized to report their action to an adjourned meeting of the bar to be held in the Supreme Court room at Nashville on March 7, 1908, to which time the meeting adjourned.

Pursuant to adjournment, the bar of Tennessee again met at the Supreme Court room in Nashville on March 7, 1908, when the Hon. D. L. Snodgrass, chairman of the committee on resolutions, submitted on behalf of the Committee the following resolutions and moved their adoption, to wit:

"John Summerfield Wilkes was born near Culleoka, Maury County, Tennessee, on March 2, 1841, and died at his home in Pulaski, Tennessee, February 2, 1908. His father was the Hon. Richard A. L. Wilkes, a prominent citizen of Maury County, four times a member of the General Assembly of Tennessee from that county. He was educated at the school established by his father at Florence, Alabama, and under a private teacher at Nashville, Tennessee. In early life he joined the Southern Methodist Church, of which he remained an active member until his death.

"Upon the breaking out of the Civil War in 1861, Mr. Wilkes came to Pulaski, and on the 7th day of May of that year, enlisted as a private in the Company of Capt. Jno. C. Brown, Confederate Army, which became Company A in the Third Tennessee Infantry, upon the organization of that regiment at Lynnville, Tennessee, on the 16th day of the same month, when Capt. Brown was made Colonel of the regiment, and, as is well known, afterwards became Brigadier and Major General, and in 1871, Governor of Tennessee.

"A few days after the organization of the regiment Judge Wilkes was made Commissary Sergeant under his brother R. L. Wilkes, the Commissary. The regiment was captured at the battle of Fort Donelson early in 1862, and Judge Wilkes, with the other non-commissioned officers and privates, was sent to Camp Douglas, his brother, R. L. Wilkes, with other officers, being sent to Camp Chase, where he died. The officers and privates of the regiment were exchanged in August and September, 1862, and on

the 26th of the latter month the regiment was re-organized at Jackson, Miss., when Judge Wilkes was made Captain and Commissary to succeed his deceased brother. This position he held until, in 1863, when on account of the depletion of many of the regiments of the army, the office was abolished by the Confederate Congress, but he was retained in the Commissary Department and charged with the onerous duty of collecting supplies for different commands, having for a time headquarters at Jackson, Tennessee, with a territory of operations extending South to West Point and Aberdeen, Mississippi, and at the latter place was paroled at the close of the War in 1865.

"It was at Aberdeen, Mississippi, that he met, wooed and won Miss Florence Barker, who became his wife shortly after the surrender, on June 20, 1865. Judge Wilkes, immediately upon his marriage, returned with his bride to Giles county, and began the study of law under General Jno. C. Brown, his old Colonel, then a leader of the Bar at Pulaski, and one of the most distinguished men of the State; and on April 18, 1866, was licensed to practice, remaining until the following year in the office of General Brown. In 1867 he formed a law partnership with A. J. Abernathy, afterwards Chancellor for sixteen years of that Division, which continued until 1869. when he became the partner of General Brown. Upon the election of General Brown as governor, Judge Wilkes was made his private secretary and ex-officio Adjutant General, in which capacity he served through the two terms of Governor Brown, then resuming the practice of law at Pulaski.

"In 1875, he was made assistant cashier of the Giles National Bank of Pulaski, and about a year later was elected vice president and after its liquidation he became president of the Citizens' National Bank, of Pulaski.

"In 1878, Judge Wilkes and Governor Brown renewed their law partnership and were doing a large practice when, in the same year, Governor Brown was called to aid in the building of the Texas & Pacific Railroad, then under control of the great railroad builder, Thomas Scott. This new and distant work of Governor Brown operated to dissolve the partnership relations between him and Judge Wilkes, and the latter continued the practice of law and his banking and other business at Pulaski.

"Judge Wilkes had always manifested and taken an ac-

tive interest in education, and February 2, 1882, he was elected president of the board of trustees of Martin College, a noted female college then under the management of the Misses Hood and Herron, and enjoying a wide reputation and excellent patronage indeed, one of the leading institutions of its kind in the State.

"In 1886, Governor Brown having been appointed Receiver of the Texas & Pacific Railroad Company, he appointed Judge Wilkes as Treasurer.

"This position he filled with distinguished ability, and to the perfect satisfaction of all concerned. He returned to Pulaski in 1889 and formed a partnership with his nephew, the late Hume R. Steele.

"This partnership continued until January 16, 1893, when Judge Wilkes was appointed by Governor Turney as justice of the supreme court of the State, to fill the vacancy created by the election of Chief Justice Turney as governor. Judge Wilkes was elected to succeed himself in 1894, and again in 1902, and continued in that high, honorable and responsible office until his death.

"Such, in brief outline, is the career of the man whom we, his professional brethren, associates and friends, have met to honor and commemorate.

"When we look further, and into the details of that career, we learn from those who have been constantly in touch with him that the moral convictions manifested by his youthful espousal of the Christian religion, the surest foundation of true nobility of character, have guided and controlled him through all the varied activities of his life, making him charitable, prudent and circumspect, courteous and kind, tolerant of the opinions of his fellows, considerate and forbearing, sunny minded and free from selfishness, pride and vanity; that the spirit of patriotism, which led him to devote his young manhood to the defense of his native State, thus evidencing that his ears were early open to the call of duty, likewise inspired and dominated his subsequent life; that his championship of the cause of education, evincing a keen sense and appreciation of the importance of the dissemination of knowledge and the elevation of the standard of intelligence and his readiness to actively contribute to that end, was a characteristic of the unselfish public spirit ever present with him; that the untiring patience and persistent and conscientious industry

with which he handled the infinite details, first, of the army supplies, and next, of the State and its indebtedness, and finally, of the great railroad receivership of which he was treasurer, were typical of that thoroughness with which he accomplished and was enabled to accomplish, everything he attempted; and that in all these, added to an accurate and discriminating mind, are to be found the secret of his great and acknowledged ability as a member of the Court of last resort.

"Mr. Justice Wilkes was an exemplar in all his relations, public, professional, social and private. In his family he was what is to be expected of a man of his character and class—kind, tender, loving and beloved. As a self-forgiving, submissive to authority, uncomplaining, courageous. As a citizen, law abiding, honest, industrious, public spirited. As a lawyer, thorough, painstaking, earnest, forceful, devoted to his client, the soul of honor, respectful to adversary and court. As a public servant or official, diligent, conscientious, faithful, devoted to duty. As a judge, patient, forbearing, courteous to counsel, impartial, penetrating, clear, logical, conservative, able, and sometimes delightfully humorous.

"That Mr. Justice Wilkes was really and truly a great judge is beyond question. He possessed, in eminent degree, those qualities of mind and habits of thought and work, and that training and experience at the bar and in business, which combine to make, and are essential to, a great judge. It is not claimed for him that he was endowed with any transcendent superiority of natural ability, or constructive genius; and fortunately he did not suppose himself so endowed and place reliance, as some have done, upon such supposed qualities rather than upon laborious and thorough study and research. But to a mind clear, analytical, discriminating and logical, a judgment sound, well balanced and open to reason and truth; and a sense of justice abhorrent of all sham and wrong, he added an indulgent and unflagging attention to argument, a thorough and exhaustive examination into record and briefs until all the facts and pertinent law were marshalled in order before his mental vision, and a knowledge not only of the practice of the courts but of men and their motives, gained from a long and wide experience at the bar and in

incorruptible; and the result necessarily was that his decisions were just and invulnerable, and his opinions cogent and conclusive.

"It is not much to say of a judge that he was incorruptible, for all judges are assumed to be incorruptible. But it is something to say of a judge that he was never charged or suspected of partiality, or of being swayed in his judgments by favoritism or other improper influence; and this may be truly said of Mr. Justice Wilkes. No taint touched him as a man, as a lawyer, or as a judge. Of him may be truly written what the poet Whitstone wrote to Chief Justice Dyer in the Elizabethan age

"He ruled by law, and listened not to art;
These foes of truth, love, hate and private gain
His conscience would not stain."

"Resolved, That in the death of John Summerfield Wilkes, the State has lost an eminent and honored citizen and servant; the judiciary, an able and upright Judge; the bar, one of its most distinguished members.

"Resolved, That his life and work have brought great and lasting benefits to his native State, and are worthy of all praise and emulation.

"Resolved, That we tender to his surviving family our sincere sympathy.

"Resolved, That the Honorable Supreme Court of which he was so long a member, now in session at Nashville, be requested to have the proceedings spread of record upon its minutes; and that the Honorable Attorney-General be requested to publish them as an Appendix to the next volume of Tennessee Reports.

D. L. Snodgrass, Chairman. J. M. Anderson.

Jno. A. Pitts.

W. C. Caldwell.

Jas. C. Bradford.

Jerome Templeton.

J. J. Vertrees.

H. H. Henderson.

Luke E. Wright.

C. G. Bond.

Flournoy Rivers.

S. G. Shields.

Grainger Latta.

C. W. Tyler.

S. J. Kirkpatrick.

A. W. Biggs.

W. T. Smith.

J. A. Susong.

L. B. McFarland.

E. H. Hatcher."

Robt. Burrow.

After appropriate remarks had been made by a number of the members of the bar present, the report of the committee on resolutions was unanimously adopted by a rising vote. Thereupon, upon motion, the chairman of the Committee on resolutions, the Honorable D. L. Snodgrass, was appointed to present said resolutions to the Supreme Court, and ask to have them spread upon the minutes, after which the meeting adjourned.

PRESENTATION OF RESOLUTIONS TO SUPREME COURT.

When the Supreme Court convened after the adjournment of the bar meeting, the Honorable D. L. Snodgrass, having presented the foregoing resolutions and moved that they be spread upon the minutes of the court, said: "May it please Your Honors:

"The Committee on resolutions respecting the death and memory of Judge Wilkes, recently appointed at the Bar Meeting in this Court, has prepared the resolutions and herewith submits them to the Court, with the request that they be spread upon the minutes and published in the next volume of reports of opinions of this Court, as a deserved tribute to the memory of a just judge, a loved associate on the bench, and a noble Christian man.

"The resolutions speak all it is essential to say in a necessarily brief summary of his life and character. I do not wish to supplement them with anything more elaborate or more fulsome, or to go into the field they have briefly and tenderly covered. I only wish to add a comrade's kindly tribute before other associates in his great work now finally and forever finished. I do not desire to speak of his work or accomplishment on the bench as a member and a lawyer. His legal monument has been built by himself and for all it is, and all it portrays, stands in conspicuous favorable light in our reports. I could by no words of mine, add a cubit to its height or refit a stone in its structure. It will ever represent strongly the work of a patient, toilsome, just, gentle, intellectual judge, who tried to do right within the law as he understood it. I am not at this time and in this presence of old comrades of his and old associations with all, speaking to these things. I wish to lay my tribute of affection on a higher altar—the

recollection of what he was to us all, through long years of toil and trial, of conference and consultation, and to speak most tenderly of that spirit which made it all one unbroken recollection of patience and gentleness, of manly good will and fraternal comradeship.

"The work of this bench has always been under disadvantages now unknown to the most progressive civilization. It has always required the best of health and the best of spirits to do both its enlightened, thoughtful work, and at the same time its clerical and concomitant drudgery, with anything like reasonable respectability in the estimation of an exacting bar and an enlightened public. But for this work like that of the great lexicographer as described by himself was done, 'not in the soft obscurities of retirement or under the shelter of academic bowers but amidst inconveniences and distraction, in sickness and in sorrow.' And yet he brought to it all the tireless industry, the patient endurance, the genial co-operation of uncomplaining burden-bearing, and the brotherly regard and consideration for all his associates, which made his dwelling together with us a union of delight and a memory of tenderness. In his going away, a brother and a friend has departed, whom none of us can ever cease to feel was a part of the gentlest and purest of our lives. But it is not for us to order, only to suffer and submit.

"The King of Kings
Alone can stay life's parting wings."

"There is one supreme consolation left to us, the constantly strengthening trust in immortal life. The revelation of that religion of which he was so devoted an adherent and of which we are all more or less trusting followers, has ingrained that trust in all of us, ineradicably, let us hope. Organized nature, not otherwise satiable, teaches it, and now the greatest names of science, household words in her loftiest temples, the Wallaces, the Crookes, the Lodges and the Flammarions have all left the gloomy darkness of materialism and subscribed to the glowing fact that the evidence, the scientific evidence, of immortality are overwhelming.

"We can take joy in believing that we have not lost our brother.

"We can disavow the dark pessimism of the Persian, who told us to

"'Cry not to that inverted bowl, the sky, for it as impotently moves us, you and I,'

"And cling in serene faith to the belief that our brother's life, like that eternal recurring star of the morning, has not 'gone down behind a darkened West, nor set obscured amid the tempests of the sky, but melted away into the light of Heaven.'"

Thereupon Chief Justice Beard, for the Court, responded:

"Judge Snodgrass: The members of the bench join the Bar of the State of Tennessee in its tribute to the worth of Judge Wilkes, both as a lawyer of great ability and as a just judge. But there is a sense of loss that the members of the bench feel that the genial members of the Bar cannot entertain—it is a sense of personal loss in the death of this wise and good man. For the last twelve years at least three members of the Supreme Court have been meeting Judge Wilkes in the consultation room, where the most intimate association occurred, and where it is impossible, as has just been stated, for any one to conceal his personality. We have met him twice a week; we have had evidences there of his ability, of his impartiality, and his indefatigable work as a judge. But in addition to all this, we have seen the human side, the personal side, of his life, and that side more than the side which characterized the jurist has addressed itself to our affectionate remembrance.

"Judge Wilkes not only brought into the consultation room evidences of his laborious and conscientious work, but he brought a delightful personality there; always affable in his association with the members of the bench, conscientious in the reports of his cases, the deep convictions as to the opinions he had formed after listening to the arguments and examination of the record, yet ever willing to listen to arguments that might be made against his convictions, and whether moved or not to adopt the opinions pressed upon him by his associates, yet he always received the suggestions with the most polite consideration. In this close association it could not be otherwise than that the strongest ties should be formed. So it is, to those of us who were brought in close touch with

him, there is a feeling that a personal loss has occurred to us in his death.

"The recollection of Judge Wilkes in the last few years of his life in his service upon the bench is rather pathetic than otherwise. I do not suppose there is any member of this Court who had not noticed, for two years or more before his career ended, that the sands of life were running out. Feeble physically during the whole service that he had upon the bench, this feeling of feebleness increased and became more marked as the years passed by, and it became more and more apparent to the members of the bench that the end of life was rapidly approaching for Judge Wilkes.

"His Last Day's Service.

"I shall never forget as long as I remember anything, the last day's service that he performed as a member of this Court. He had committed to him by the Court, and rather against the protest of members of the Court, a most important case. We felt at the time that he was imposing upon himself a labor that he ought not to assume in his physical condition, but unwilling to appear to shirk work which fell to him, he asked to be permitted to take the record and do the labor necessary for its decision, and it was so directed or allowed. At the close of the term the case had been reported in the consultation room a day or two before, and this opinion agreed upon, it was announced that Court would meet as usual at 9:30 o'clock to finish the work of the session and give Judge Wilkes an opportunity to deliver the opinion in that case. However, we were kept in our consultation room on Friday until a very late hour in the night, Judge Wilkes not being with us. The Clerk was directed to announce that the meeting of the Court would be postponed until the afternoon. I shall never forget the appearance of Judge Wilkes when he came to me in the breakfast room in the morning and told me he had seen an announcement of the postponement until the afternoon and he said to me that it would be impossible for him to remain and deliver that opinion in his condition of personal weakness. After a consultation he was induced to postpone his going to his home in Pulaski and undertake to deliver his opinion. He came upon the bench that afternoon and performed his last ser-

vice, and it was pathetic to see him perform that service, so feeble was he.

"So it is that in our recollection of Judge Wilkes there is mingled a feeling of affection and pathos that will not soon grow dim.

"The memorial address and resolutions submitted to the Committee will be spread upon the records, and the Attorney-General will be directed to embrace in his next report a copy of the memorial and resolutions, together with the address with which they have been presented to the Court by Judge Snodgrass."

A Tribute

TO THE MEMORY OF

HON. A. B. WOODARD.

Formerly one of the District Attorneys of Tennessee.



WHEN the Supreme Court met in the Capitol at Nashville on December 16, 1907, Hon. A. B. Neil, of the Nashville bar, presented certain resolutions respecting the life and character of the Hon. A. B. Woodard, which had been adopted by the Fayetteville Bar Association and afterwards approved by the Bar Association of Davidson County, and moved that said resolutions be spread upon the minutes of the court, which motion was granted, and an order entered directing that said resolutions be spread upon the minutes of the Supreme Court. Said resolutions are as follows:

"Andrew Buchanan Woodard was born in Lincoln county, Tennessee, on the 8th day of September, 1851. He was the son of Robert S. and Polly Woodard, the progenitors of a numerous and worthy family. He spent his boyhood on a farm in Lincoln county, having in his early days few educational advantages. During the war he and a brother, M. W. Woodard, now judge of the Lincoln County Court, supported and cared for the family by labor on the farm, while the father and the other older sons were battling for the Southern cause.

"About the time of his reaching the age of seventeen, Gen. Woodard became afflicted with rheumatism, and was never thereafter entirely free from this disease. It produced the lameness with which he was afflicted. This disorder so affected him in his youth that he was unable to do manual labor. He thereupon entered school at Milton Col-

lege, a noted institution of learning of Middle Tennessee, just after the war. Here he laid the foundation that enabled him to acquire in after life considerable learning and culture. While attending this school he was appointed deputy circuit clerk of Lincoln county by Dr. Rane McKinney, who was in 1870 elected to that office. Gen. Woodard was then, as he ever afterwards remained, a fine penman. He had also a good comprehension of forms and an extensive vocabulary. These qualifications enabled him to discharge with ability the duties of this office. Some year or so after his appointment as deputy, his principal, Dr. McKinney, died. Judge Hickerson, the then circuit judge, immediately appointed Gen. Woodard circuit clerk, and he discharged the duties of this clerkship with great skill and ability until the next regular election. While acting as deputy clerk and also as clerk he pursued the study of law with great diligence, and shortly after his retirement from office, he was admitted to the bar in Fayetteville. He then went into the office of Holman & Holman, a noted firm of lawyers in Lincoln county, and prosecuted his studies and aided that firm in their practice for some two or three years; at which time, to wit, 1878, he was elected to the office of attorney-general for the old Sixth judicial circuit, defeating a number of able competitors. No man ever discharged the duties of this office with greater fidelity or zeal for the public interest, and very few ever equalled or surpassed him in the display of skill and ability in the management of great murder cases. At the same time, however, he did not neglect the smaller but essential duties appertaining to this great public office.

"In 1886, at the expiration of his term as attorney-general, he entered upon the practice of law at Fayetteville, forming a partnership with Judge S. W. Carmack, an able lawyer, with whom he continued in partnership until the death of Judge Carmack, which occurred in 1892. Thereafter Gen. Woodard continued in the practice of law at Fayetteville until the fall of 1905, sometimes alone and occasionally associated with other lawyers. During the period mentioned he had as partners at different times, Judge M. W. Woodard, and his son, Bert P. Woodard. The practice of Gen. Woodard extended into the counties of his old circuit, and he took part in some of

the most noted criminal cases and jury trials ever heard in Tennessee. He also did considerable chancery business, but he preferred criminal and jury practice. His zeal for his clients was unbounded, and it sometimes caused him to make the cases of his clients his own. His industry and application were great, and he brought to bear upon his cases all the fire, eloquence and earnestness of a Felix Grundy. He was particularly impressive and forceful in the discussion of the facts of a criminal case, and was very successful in securing verdicts for his side of the controversy. His services were much in demand in the prosecution of men charged with murder, and very few juries ever wholly effaced from their minds the effects of his warmth and eloquence.

"In 1892, Gen. Woodard was unanimously chosen as elector for the 5th congressional district of Tennessee on the Democratic national ticket, and in 1896 he was likewise unanimously selected as one of the electors for the State-at-large. The speeches made by him during those two campaigns were noted for their learning and eloquence. His speeches were numerous. They elicited the most favorable comment and had a great deal to do with the success of the Democratic party in the State during those years. Gen. Woodard labored zealously and faithfully for his party. The campaigns made by him were arduous and his sacrifices great. Numerous friends felt that the party in Tennessee never wholly requited Gen. Woodard for his efforts and his zeal in its behalf.

"In 1898, at the solicitation of friends from every portion of the State, he entered the race for governor. His competitor was that distinguished Tennessean, the Hon. Benton McMillin. The campaign was warmly waged. The political wheel of fortune, was, however, turned towards his antagonist. Although defeated, Gen. Woodard took the stump and made several strong speeches for the nominee.

In 1904, Gen. Woodard entered the race for congress in the 5th congressional district. Lincoln county supported him loyally and warmly, giving him about thrice the number of votes obtained by all his opponents, three in number. He was defeated in the primary by a plurality of 186 by the showing on the face of the returns. He was immediately thereafter urged to announce himself as a candidate in 1906, with assurances from all over the dis-

strict that he would receive strong support. But Gen. Woodard had grown weary of political life and was sick of some of the methods to which he believed successful candidates had to resort, and he gave up all ambition or aspiration for place or power, and determined to devote his time and attention to the practice of law. To this end, he, in the latter part of 1905, removed to Nashville, and was beginning to impress himself as a lawyer upon the bar and people of that city when overtaken by death. He died upon the 25th day of May, 1907, at his home in the city of Nashville. He left surviving, his widow, who was a Miss Todd, of Fayetteville, and five children, the eldest Bert P. Woodard, a worthy young lawyer of Nashville.

"Gen. Woodard was a man of great purity of morals and cleanliness of character, and was rigidly honest. He despised fraud and deceit and sharp practices, and tried to elevate his profession in every way. He was noted for his deference to the court during the trial of cases, although he exercised freely on the outside of the courtroom what he considered to be his constitutional right of criticism.

"He was a man of a most charitable disposition, and was known to help a great many needy persons by substantial donations. He was particularly watchful of his dependent relatives and never permitted any of them to suffer if by his aid they could be relieved. He took great pleasure in assisting the young lawyers. Those whom he materially helped to get on their feet can be named by the dozen. He was a supporter of churches and Sunday schools, and was careful to see that the ministers of the Presbyterian church, of which he, in the latter part of his life, became a member, were provided with funds and subsistence. Gen. Woodard was a man who took great interest in public affairs and educational matters, and aided in every way within his power in the promotion of the moral and material advancement of his people. He was plain and outspoken in his views upon political and social matters, and possessed firm convictions upon nearly all questions. He preferred to stand on the bedrock of truth and proclaim what he believed to be right rather than to trim his sails for favorable winds.

"Therefore, Be it resolved by the members of the bar at Fayetteville, in meeting assembled, that in the death of

Gen. Woodard, we have lost an able, faithful and honored member; that the State has lost an illustrious son and useful citizen; his church, a worthy member; the young, a noble friend; the cause of truth and right, an able and fearless champion; and his family, a kind, considerate and generous husband, father and brother.

"Resolved, Second, That we tender to his family our sincerest sympathies with the statement that we learned with deep regret of his demise.

"Resolved, Third, That these resolutions be presented to the several courts of record of Lincoln county and to the supreme court at Nashville, with the request that they be spread on the minutes, and that a copy hereof be presented to the Bar Association at Nashville, and that all papers in Lincoln county be requested to publish the same, and that copies be furnished the family of Gen. Woodard.

Respectfully submitted,
Joseph C. Higgins, Chairman.
Geo. W. Sutton.
N. P. Carter.

Committee."

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